Employer monitoring of work computers: What are the privacy rights of employees?

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Employers have an interest in ensuring that computer systems in the workplace are used for proper purposes and not for unlawful conduct, information theft, harassment of other employees, and other similar improper uses. In order to monitor workplace computer use, employers have access to third-party software programs that collect and analyze all activity on company computers. This is primarily done by recording and analyzing keystrokes, taking screenshots of employees' computers (often taken every two or three minutes), and using keywords to search for possible violations of employer policies with respect to the use of workplace computers.

Monitoring software will normally include a review of emails, instant messages, websites visited, and online searches. The software can monitor and collect the information in real-time on an ongoing basis. Despite the availability of monitoring technology, employers must balance monitoring workplace computer use against the legally protected privacy rights of employees.

Is Personal Computer Use Allowed? Actual Reality of Workplace Governs Courts

Many employers establish written policies dealing with employee use of workplace computers, and employees are often required to sign these policies. In most cases, the written policies set out the guidelines for workplace computer use and also advise employees that their computer system use is subject to employer monitoring.

Such policies, however, would only remove the privacy rights of employees in limited circumstances. When the courts or other tribunals are considering the privacy rights of employees, they are guided by the actual reality in the workplace with respect to computer use.

It is very common that employers permit employees to use workplace computers for personal reasons provided the personal use is fairly minimal. For example, if employees are permitted to send personal emails, or to access their bank account online, then personal use by employees is permitted. Once that is the case, the employees have a reasonable expectation of privacy with respect to their personal use of the workplace computer. Except in unusual circumstances, the employer is not permitted to read or monitor their personal emails, take screenshots of their banking transactions, or engage in any other intrusion into their private information. In addition, the law is that an employee's privacy rights include information about which websites the employee has visited. Monitoring software does not make any distinction between personal and business use. All emails are monitored. Screenshots are taken without regard to what is on the screen. All Internet browsing is tracked. The monitoring itself then becomes a violation of the privacy rights of employees.
In each case, the court will consider whether the employer permits employees to use the computers for personal use. If personal use is permitted, even to a limited extent, a policy that purports to remove the employee’s right to privacy will be unenforceable. Any breach of an employee’s privacy rights is an offence under the applicable privacy legislation.

If, however, an employer prohibited personal use of workplace computers by employees and actually enforced that policy, the reality in the workplace would be that no personal use of workplace computers is permitted in any circumstance. In this case, the written policy dealing with monitoring by the employer would likely be enforced. That, however, is not the normal scenario in the workplace.

If an employer is conducting an investigation into a specific complaint with respect to an employee, the employer would have more power to review computer records. This would still be subject to the test of whether or not the employer has any reasonable alternatives to carry out the investigation without infringing on the employee’s privacy rights. If the employer is not able to meet that test, then any evidence gathered through the computer system will not be admissible evidence against the employee in a hearing.

**Can Employees Expect Digital Privacy in the Workplace?**

If employers allow employees any personal use of workplace computers, employees have a reasonable expectation of privacy with respect to their personal use of the computer system. This must be respected by employers. A monitoring system that reviews the personal use of the computer system by employees in those circumstances is a violation of the privacy rights of the employees.