



Lancaster, Brooks & Welch LLP

BARRISTERS AND SOLICITORS

Business Bulletin, October 2006

Are you Allowed to Monitor your Employee's E-mail and Internet Use?

by Leanne Standryk¹

Internet abuse by employees – in every profession, in every rank and of every nature – is a serious problem for employers seeking at once to integrate the internet as a high efficiency business tool and at the same time manage its alluring, non-work related temptations. Internet and e-mail monitoring by employers is on the rise. Common reasons for monitoring include safeguarding confidential information, preventing harassment, discrimination or misconduct in the workplace and improving productivity. Do employers have the right to monitor and do employees have a general right to privacy? The answer to the question would appear to be simple. It calls for a yes or no answer. While employees feel that they have an absolute right to privacy, the law in Ontario is not so clear. The answer to the question involves a balance between the privacy rights of employees as individuals and the business interests of employers. This also becomes relevant when labour arbitrators and courts are called upon to examine the extent to which employers may monitor and act upon employee use of e-mail.

The law generally recognizes the employers' right to monitor internet use, in/outbound e-mails, record keystrokes, take screen shots and monitor the length of time spent on applications or documents. In order to justify surveillance of e-mails it is important for employers to demonstrate that the surveillance was reasonable. This includes ensuring that the surveillance is carried out for a valid purpose, is necessary and not in breach of an employee's general expectation of privacy. For example, continuous and general monitoring to investigate all aspects of an employee's use of time may not be reasonable. However, if monitoring is in response to a particular workplace complaint regarding an employee's inappropriate use of the internet or e-mail, monitoring may be considered reasonable.

In conducting this balancing act, it is imperative that employees are advised that their e-mails may be monitored in order to counter potential employee arguments of an expectation of privacy with respect to e-mails. Employers should implement a policy, ensure that the employee acknowledges notice of the policy, understands the policy and agrees to be bound by the workplace policy. The Ontario Information and Privacy Commission suggests that an important part of employee notice includes educating employees on the perils of e-mail communications, not only from a personal perspective but from a general business liability perspective.

In developing an acceptable policy employers should stay away from legalese, outline the prohibited use, confirm ownership of the systems and files, confirm the employers' ability to monitor such activity, outline the potential method and frequency of monitoring, explain the rationale behind the policy and/or link the policy to the harassment and/or discrimination policy.

From a legal standpoint there are no concrete guidelines to a perfect policy. The privacy interests of employees is an area in which we should expect ongoing development. At present, there are many grey areas. These grey areas may become more or less black and white in upcoming months and years. In the meantime, administering issues in this area requires employer sensitivity and an appreciation that the right to monitor will be met with much resistance from employees. Communication will be the key to balancing employer and employee interests in workplace privacy issues.

The foregoing is provided to you for information purposes only. We caution you to obtain legal advice specific to your situation in all circumstances.

Rodger Gordon rgordon@lbwlawyers.com
Harry Thorsteinson hthorsteinson@lbwlawyers.com
Gary Black gblack@lbwlawyers.com
David L. Edwards dedwards@lbwlawyers.com

Robert Welch rwelch@lbwlawyers.com
R. Bruce Smith bsmith@lbwlawyers.com
Del C. Daignault ddaignault@lbwlawyers.com
Michael A. Mann mmann@lbwlawyers.com

¹LeanneStandryk is a partner at the firm, practicing labour relations and employment law - she may be contacted at lstandryk@lbwlawyers.com.

Lancaster, Brooks & Welch LLP

PO Box 790, 80 King Street, St. Catharines, Ontario L2R 6Z1 Tel. 905.641.1551, Fax 905.641.1830

PO Box 67, 247 East Main Street, Welland, Ontario L3B 5N9 Tel. 905.735.5684, Fax 905.735.3340

www.lbwlawyers.com