

Blog Post

The Boss is Watching – But Many States Impose Requirements for Surveillance at Work

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With the rise of remote work, employers are increasingly considering measures to monitor employee's work, whether for security purposes, or to monitor productivity. But employers take note: some states are starting to weigh in by passing laws that limit employer monitoring, or require employers to notify employees that they are monitoring them. And recording employee calls is a whole separate issue governed by state law. In some states, only one party need consent to recording the call, while in others all parties must consent.

New York has become the latest state to take action on monitoring. Effective May 7, 2022, the New York law requires private employers to notify employees if they monitor or otherwise intercept phone conversations, email, or internet access or usage, or usage of any other electronic device or system including but not limited to a computer, telephone, wire, or other electronic communication system. Employers in New York are required to notify both current employees, and newly hired employees, and to post the notice in a conspicuous place readily viewed by impacted employees. Employers should further have employees acknowledge receipt of the notice, and keep the acknowledgements. Employers who violate this law in New York may be fined \$500 for a first offense, \$1,000 for a second, and \$3,000 for all subsequent offenses.

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With the passing of this law, employers should be on the lookout for other states that may shortly follow suit. Connecticut already has a similar law requiring employers to issue a written notice to employees if they are being electronically monitored in the workplace. The Connecticut law also prohibits an employer from requesting or requiring employees or applicants to provide to the employer usernames and passwords for personal online accounts, to access or authenticate a personal online account in the employer's present, or invite the employer or accept the employer's invitation to join a group related to the employee's personal account.

Delaware also requires that an employer provide notice to employees of monitoring: either an electronic notice of employer monitoring or intercepting policies one each day the employee accesses the employer-provided email or internet access services, or a one-time notice of the employer's monitoring or intercepting policies.

In California, whether an employer can monitor or record an employee's telephone communications and/or internet usage depends on whether the employee has a reasonable expectation of privacy. Courts in California consider who owns the equipment in question, whether the employee was given notice that a device they were given may be monitored, whether the employee had the opportunity to consent or reject monitoring, and accepted community norms.

In Texas, employer monitoring of employee electronic communications is considered an invasion of privacy. An employer may monitor its own phone system in order to ensure that employees are using the system for its intended purposes, however, employers must inform employees that this monitoring may be taking place.

Some states have not specifically addressed employer monitoring, but have other strict privacy laws that may consider an employer monitoring

their employees' communications to be an invasion of privacy. For example, in Alabama employers are prohibited from overhearing, recording, amplifying, or transmitting any part of a private communication (with very limited exceptions). In some states, including Arizona, Colorado, the District of Columbia, Illinois, Iowa, Kansas, Texas, and Wyoming, the *interception* of electronic or oral communications is prohibited unless the interceptor is a party to the communication, or a party to the communication consents.

Five (5) states, including Florida and Illinois, require all parties to consent to *record* a telephone call. In Michigan, all parties must consent to the recording of a telephone call if a third party does the recording, but allows one party consent if a participant records; and Montana and Washington state laws require all parties to consent to recording, unless a recording party gives proper notice.

Whether it's monitoring activity, intercepting communications, or recording phone calls, if you are considering monitoring employees, or have any questions about what monitoring is appropriate in your workplace, contact your Akerman attorney.

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