

Insights

NEW YORK ENACTS EMPLOYEE PRIVACY PROTECTIONS WITH ELECTRONIC MONITORING LAW

Feb 07, 2022

Beginning May 7, 2022, employers that monitor their employees' electronic communications are required to provide written notice to current employees and to new employees, upon hiring. The new legislation, signed into law on November 8, 2021, seeks to balance an employee's right to privacy and an employer's right to monitor computer activities and telephone usage within its organization. The legislation anticipates that by making monitoring guidelines transparent, employees will understand the consequences of inappropriate internet activities and telephone usage, and may be less likely to undermine the employer's standards.

WHO IS COVERED?

The new law broadly defines "employer" as any individual, corporation, partnership, firm or association, regardless of size, with a place of business in New York State but does not include "the state or any political subdivision of the state."

WHAT ACTIVITIES ARE COVERED?

Under the requirements of the new law, all private employers who monitor or intercept "telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage of or by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio, or electromagnetic, photoelectronic or photo-optical systems, shall give prior written notice upon hiring to all employees who are subject to electronic monitoring."

WHAT ARE THE NOTICE REQUIREMENTS?

The notice must be in writing or electronic form (e.g., viewable on the company's intranet). Because the law requires an acknowledgment of receipt of the notice "either in writing or electronically," employers should retain written or digital confirmation of each employee's acknowledgment who is subject to electronic monitoring.

In addition to providing written notice, employers must post a notice of electronic monitoring in a "conspicuous place which is readily available for viewing" by its employees. The law appears to

require specific language. As such, the notice should advise employees that “any and all telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio or electromagnetic, photoelectronic or photo-optical systems may be subject to monitoring at any and all times and by any lawful means.”

DOES THE LAW PROVIDE A SAFE HARBOR?

Despite its broad reach, the law provides a safe harbor in that it does not apply to processes that (1) manage the type or volume of incoming or outgoing electronic mail or telephone voice mail or internet usage, (2) that are not targeted to monitor or intercept the electronic communication of a particular individual, and (3) are performed solely for computer system maintenance and/or protection. Therefore, routine system-based tasks that scan or block certain transmissions (such as general monitoring for malicious software or spam mail, and firewall protection) are not covered activities.

WHAT ARE THE CONSEQUENCES OF NON-COMPLIANCE?

There is no private right to action, but the New York State Attorney General is empowered to enforce this law. Employers who violate the law could face fines which escalate from \$500 for the first offense, \$1,000 for the second offense, and \$3,000 for the third offense and each subsequent offense.

NEXT STEPS

Although the law is not effective until May 7, 2022, employers should review their electronic monitoring policies and implement systems to furnish the required notices to existing employees and to future employees upon hiring, to maintain documentation of receipt, and to post the required notice, in a conspicuous place. Also, employers may want to speak to counsel about the appropriate language for their notices and whether their handbooks or stand-alone policies are sufficient to comply with the law’s requirements.

Bryan Cave Leighton Paisner LLP has a team of knowledgeable lawyers and other professionals monitoring developments surrounding vaccine mandates, and can prepare and review your vaccine policies, and answer your questions. If you or your organization would like more information on this or any other employment issue, please contact any attorney in our [New York City office](#) or the [Employment and Labor practice group](#).

RELATED PRACTICE AREAS

- Employment & Labor
- Data Privacy & Security

MEET THE TEAM



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