Day 17

ECPA exceptions
Employer control beyond the workplace
Monitoring (continued)
Exceptions to ECPA

Electronic Communications Privacy Act (ECPA-1986) prohibits interception of email and reading stored email without a court order, but makes an exception for business systems of employers.

Courts put heavy weight on the fact that computers, mail, and phone systems are owned by the employer who provides them for business purposes.
Cases/Law

- Courts have ruled against monitoring done to snoop on personal and union activities or to track down whistle blowers.
- Court decisions sometimes depend on whether an employee had a reasonable "expectation of privacy."
- Many employers have privacy policies regarding email and voice mail.
- The National Labor Relation Board (NLRB) sets rules and decides cases about worker-employer relations.
- Recent filings
Social media & getting fired

- Basing disciplinary action on personal, non-work social media is controversial because it extends employer control beyond the workplace.

- Content in social media is often widely distributed; thus impact is stronger than that of a private conversation.

- Employer restrictions on non-work social media do not violate employee’s freedom of speech – but policies must be in place to have legal standing.

In general, employers cannot* fire you for posting:

- Truthful statements about working conditions, like harassment or unsafe working conditions.
- Comments that indicate your interest in joining or supporting a union.
- Messages to other co-workers suggesting that they contact a lawyer to get information about workplace rights.
Police officer fired after boss read (sexually explicit) text messages on work-provided device → pager in 2001.

“Light personal communication” was explicitly allowed in the PD’s instructions for device use.

Quon exceeded the PD’s text plan several consecutive months, leading the boss to first ask for reimbursement, then eventually search the messages.

Supreme court found that the audit (search) was work related and therefore did not violate Quon’s 4th amendment rights.

Precedent: ECPA doesn’t protect employees (even gov’t employees).

Teacher resigns after nude pic from her phone spread through school says district

WSPA Staff
Published: February 29, 2016, 12:17 pm  |  Updated: March 2, 2016, 7:53 pm
Legal?

As of 2022, it is explicitly illegal in ~35 states for employers, or potential employers, to require passwords/access to employees’ social media accounts.

Many people post information publicly (no password needed).

Exception: May be granted access, but not passwords, to social media accounts when ascertaining facts in the scope of a criminal investigation.

FYI: Massachusetts

Massachusetts
H.B. 386
Status: Pending
Relates to social media password privacy for school students.

S.B. 962
Status: Pending
Relates to employees social media privacy protection.

S.B. 991
Status: Pending
Relates to fair employment practices.

Update: Approved March 2018

Displaying 4 actions for Bill H 386

<table>
<thead>
<tr>
<th>Date</th>
<th>Branch</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>1/20/2015</td>
<td>House</td>
<td>Referred to the committee on Education</td>
</tr>
<tr>
<td>1/20/2015</td>
<td>Senate</td>
<td>Senate concurred</td>
</tr>
<tr>
<td>5/26/2015</td>
<td>Joint</td>
<td>Hearing scheduled for 06/11/2015 from 10:00 AM-01:00 PM in A-2</td>
</tr>
<tr>
<td>4/6/2016</td>
<td>House</td>
<td>Accompanied a new draft, see H4143</td>
</tr>
</tbody>
</table>

https://malegislature.gov/Bills/189/House/H386
S.B. 2063
Status: Pending from 2015.
Provides privacy protection of student social media accounts used exclusively for personal use; provides that an educational institution shall not require a student or applicant to disclose a user name or password to a personal social media account, compel a student, as a condition of participation in curricular or extracurricular activities, to add school personnel to the list of contacts or retaliate for student refusal to comply; provides a civil action for damages.

Update: Approved March 2018

Displaying 4 actions for Bill S.2063

<table>
<thead>
<tr>
<th>Date</th>
<th>Branch</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>11/18/2015</td>
<td>Senate</td>
<td>Text of S2054, printed as amended</td>
</tr>
<tr>
<td>11/18/2015</td>
<td>Senate</td>
<td>Passed to be engrossed - Roll Call #203 [YEAS 39 - NAYS 0]</td>
</tr>
<tr>
<td>11/23/2015</td>
<td>House</td>
<td>Read; and referred to the committee on House Ways and Means</td>
</tr>
<tr>
<td>1/3/2017</td>
<td>House</td>
<td>No further action taken</td>
</tr>
</tbody>
</table>

https://malegislature.gov/Bills/189/Senate/S2063
Monitoring location and equipment usage

0 Electronic identification badges that serve as door keys
0 Provide increased security
0 Allow monitoring of employee movement

Humanyze

In order to measure human behavior, the founders needed to a tool to collect data, so they developed a smart employee badge with a microphone, accelerometer, bluetooth connection and other tools typically found in a smart phone. (In fact, it looks a bit like a cell phone.) It measures things like how people moved through the day, who they interacted with, what their tone of voice was like, if they leaned into listen and other types of interactions that happen at every company every day.

HUMAN CAPITAL

The Employer-Surveillance State

The more bosses try to keep track of their workers, the more precious time employees waste trying to evade them.

ELLEN RUPPEL SHELL  OCT 15, 2018

This Call May Be Monitored for Tone and Emotion

TOM SIMONITE  BUSINESS  03.19.18  07:00 AM

https://www.wired.com/story/this-call-may-be-monitored-for-tone-and-emotion/
These Workers Can Only Spend 6 Minutes In The Bathroom Each Day

The controversy goes back to last winter when WaterSaver installed swipe card systems on bathrooms located off the factory floor.

The company said it had little choice because some employees were spending way too much time in there, and not enough time on the manufacturing line.
Electronic Worker Tracking in NLRB Top Lawyer’s Crosshairs (1)

Oct. 31, 2022, 12:30 PM; Updated: Oct. 31, 2022, 2:37 PM

- New enforcement effort to combat ‘constant surveillance’
- NLRB precedent already forbids some electronic tracking

Robert Iafolla
Senior Legal Reporter
GPS

- Tracks an employee's location
- Used in some hospitals to track nurse locations for emergency purposes, also shows where they are at lunch or when they use the bathroom
- Used to track long-haul trucks to reduce theft and optimize delivery schedules, also detects driving speeds and duration of rest breaks

Employees often complain of loss of privacy

UPS “In 2010, package operations drivers in telematics-equipped vehicles eliminated more than 15.4 million minutes of idling time. This translates into fuel savings of more than 103,000 gallons (and avoidance of 1,045 metric tons of CO2).”