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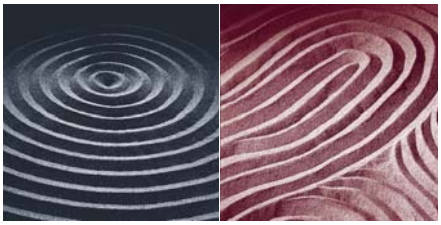

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Technically Easy, Legally Complicated : Employers should think long and hard before using technology to monitor employees

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Employers should think long and hard before using technology to monitor employees

BY STUART RUDNER AND LAURA CASSIANI

In an effort to improve employee productivity and make time and attendance tracking more efficient and accurate, some employers are turning to technological innovations.

Recently IKO Industries, a shingle manufacturer in Hawkesbury, Ont., sought to introduce a fingertip scanning system for timekeeping, payroll and security purposes. This spring the City of Montreal made headlines when it announced its intention to monitor some of its blue-collar workers using global positioning system (GPS) technology.

It is technologically possible to monitor employees' performance and time and attendance in numerous ways. However, there are some real concerns with doing so. Such efforts might have the undesirable effect of decreasing employee morale, which will typically lead to lower productivity. In addition, some of the technology is quite costly and might not be worthwhile unless there is a real problem in the workplace. Finally, many of the forms of monitoring are not permitted by law due to their infringement upon workers' privacy.

Is there a right to privacy while at work?

The objection to the implementation of almost any monitoring technology is that it violates employees' right to privacy. While such a right, even while at work, has generally been recognized, there is no single legal framework within which to assess violations. Instead, there are a number of legal regimes that exist, each of them similar but not entirely the same.

The Personal Information Protection and Electronic Documents Act (PIPEDA) applies to federally regulated employees. However, it does not cover provincially regulated workers. Some provinces have specific privacy legislation that protects the rights of individuals. For example, Ontario has privacy legislation that covers employees in the provincially regulated public sector but not private-sector employees.

Arbitrators and the courts have widely accepted an inherent right to privacy for both union and non-unionized employees. Unfortunately, within each legal regime, different rules and tests have evolved to determine whether a particular initiative violates the rights of the employees involved. However, the reasonableness of the proposed monitoring will generally be of utmost importance.

When is invading workers' privacy justifiable?

Where PIPEDA applies, the following test has been widely adopted:

•Is the measure demonstrably necessary to meet a specific need?

•Is it likely to be effective in meeting that need?

•Is the loss of privacy proportional to the benefit gained?

•Is there a less invasive way of achieving the same end?

Most arbitrators have adopted a similar analysis. First, there is consideration of whether the employer had legitimate reasons, say an existing problem, for initiating the monitoring. "Potential" problems have proven far less persuasive in justifying monitoring.

At IKO Industries, the use of fingertip scanning for timekeeping, payroll and security was met with a complaint by the union that it was a breach of privacy. In May 2005 an arbitrator said the test comes down to balancing the legitimate goals of the company against any infringement of employees' rights. The conclusion was that other, less invasive methods were available and reasonable. IKO already had a card-swipe system in place and, although it argued the system was susceptible to cheating, the arbitrator didn't find any evidence that such cheating was a problem.

If there is a valid reason for the monitoring, arbitrators will weigh any such interest against an employee's privacy rights and consider whether less invasive means are available. Arbitrators have also differentiated between surreptitious monitoring and open monitoring, holding that the threshold will be lower when employees are advised of the monitoring.

In March 2003, Arbitrator Michael Lynk, in *Prestressed Systems Inc. and Labourers' International Union of North America, Local 625*, considered the use of video surveillance where an employee was alleged to be malingering. The arbitrator held that the Windsor, Ont., concrete manufacturer must show:

•it had a concern, reasonably and honestly based, that one of its employees was engaged in conduct or behaviour which, if verified, would be in breach of an important employment obligation;

•it took reasonable and genuine steps to consider whether the verification of the conduct or behaviour could be accomplished through means other than covert video and electronic surveillance taken in public or outside of the workplace and it can reasonably explain why these more intermediate steps were determined to be inappropriate;

•the means used to conduct the covert surveillance were reasonable and measured in the circumstances; and

•the purpose of the surveillance was to investigate the reasonable concern about the purported employee conduct or misbehaviour and there were no inappropriate purposes involved.

Managing productivity

In June 2005, Alberta's Office of the Information and Privacy Commissioner considered a case where an employer, the Parkland Regional Library, installed keystroke logging software on a worker's computer. The software would log everything the worker typed. Although the worker was not told about this software, he discovered it and alleged his right to privacy had been breached.

The complaint was brought under the Alberta Freedom of Information and Protection of Privacy Act. The commissioner held the data collected was personal, as it revealed how much work the employee did and how he did it. In addition, there was evidence he used the computer for some personal tasks, such as Internet banking, with the permission of his employer. This data was also allegedly captured.

The commissioner then considered the reason for the collection of such information. The employer's statements were inconsistent, at times referring to concerns of personal use and at other times referencing a desire to monitor productivity. The commissioner was not satisfied the evidence showed a legitimate reason to install the invasive software and said less intrusive means were available to the employer. There was therefore a finding that the employer had collected personal information contrary to the act.

Although there are many tools to monitor employees' comings and goings as well as their productivity on the job, employers should think long and hard about how to use them, if at all. Thought should be given to the actual purpose of the monitoring and ensuring the methods used are the least intrusive possible.

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