

## **Monitoring Employee E-Mail: Why Employee E-Mail Use is Risky Business**

Choosing either *to* monitor or *not to* monitor employee e-mail can be risky business because, unfortunately, the reality is that an employer can be subject to liability in either scenario. There is a way, however, to turn a no-win situation into a win-win situation: we can help you, as an employer, minimize your risk of liability by helping you implement a tailored, written policy regarding employee e-mail monitoring that complies with federal and Nebraska law and that simultaneously helps to protect you against employee e-mail abuse or misuse.

Certainly every employer recognizes the most obvious impact of employee abuse or misuse of e-mail on the bottom line: it reduces productivity. What you may not have considered, however, is that failing to monitor employee e-mail use or failing to have any written policy on employee e-mail use can lead to potentially devastating liability. Are you aware that your company could be found liable for the content of an employee's e-mail? You could potentially be held vicariously liable for an employee sending a harassing or sexually suggestive e-mail. Likewise, without any policy on employee e-mail, you could be held liable for an employee who uses e-mail to coordinate, facilitate or orchestrate an illegal operation. As a final example of a commonly encountered battle waged in modern litigation is that another party could attempt to use your employee e-mails as admissions or evidence against your company in a civil suit.

Before your company is faced with any of these scenarios, consider taking the preemptive measure of becoming educated on the legal implications of workplace e-mail and of implementing a policy advising employees about e-mail use on company time and property. But, before you begin revising your company policy, however, you must be aware that e-mail monitoring must comply with Nebraska and federal laws.

### **Q&A For Employers:**

Because employee privacy rights and an employer's right to monitor e-mail entail complex legal issues there is some degree of uncertainty in the current state of the law about employer and employee rights and obligations. There are, however, some concrete steps that can be taken to ensure that you as an employer are not violating state and federal statutes as interpreted by courts with respect to monitoring employee e-mails in the workplace.

#### **Q: How Can My Company Avoid Violating Federal Law?**

Courts have now made clear that statutory revisions to the Electronic Communications Privacy Act ("ECPA") encompass the interception of e-mails. In other words, intercepting e-mails is illegal under federal law and an employer can be subject to civil penalties and punitive damages. There are a few exceptions, however, and employers should take advantage of these "safe harbors."

##### *Answer 1: Take Advantage of the Federal Law's Safe Harbors.*

An employer can avoid liability if the employee has given "informed consent" to his or her e-mails being monitored or intercepted. While the concept of informed consent might sound like a straightforward concept, case law reveals that the exemption remains somewhat nebulous. What is clear, however, is that you can take advantage of this exemption by implementing a tailored company-wide, written policy about e-mail use specific enough to encompass the types of activities to which employees will be deemed to have consented. This is perhaps best illustrated by the examples below.

##### *Answer 2: Ensure your Company Policy is Appropriately Tailored.*

A company policy should not be overly broad or too narrow. If a policy is too broad, it may not fall within the safe harbor. For example, a policy that simply states, "The Employer reserves the right to monitor all e-mails" would not likely be sufficiently specific enough to constitute full and informed consent. On the other hand, a policy should not be overly specific because it, too, might not accomplish the goal of falling

within the safe harbor. So, for example, a policy that indicates that monitoring is designed only to prevent overuse of email for personal reasons at work might be too narrow because a court might determine it does not provide sufficient notice to constitute “informed” consent in a situation where the employer discovers that the employee was disclosing company trade secrets via e-mail for example.

*Answer 3: Inform Employees that E-Mails Will be Monitored.*

Based on current law, your policy should not indicate that the employer “may” monitor e-mail use. The mere suggestion or possibility of monitoring will likely prevent you from taking advantage of the informed consent safe harbor. Rather, the company policy should explicitly inform employees that monitoring “will” take place.

**Q: Is My Company Policy Affected by Nebraska Law?**

Answer: Yes! Although many people are not aware of these laws, Nebraska has its own Intercepted Communications laws that make unlawful interception a Class IV felony in certain instances. As under the federal laws, there are safe harbors of which an employer should be aware and should take advantage. An employer can intercept communications “on his, her, or its business premises” and “in the normal course of his, her or its employment” if the employer is engaged in an activity which is a “necessary incident to the rendition of...its services.” Much like the federal laws, Nebraska law has purported to create an exception under which a business can qualify, but the exception is not well-defined and has not yet received significant scrutiny in court. Therefore, any company policy should incorporate the letter of the law as closely as possible. Moreover, a company policy should be written and distributed to employees because the law sets forth a requirement of providing “reasonable notice” to employees of monitoring.

**Final Word - What to Do Now:**

Your business should consider the very real risks of employee’s use and abuse of e-mail at work. Your company should also be aware of the attendant risks of both monitoring and failing to monitor e-mail use. You should have a written company policy to protect your company from liability that also complies with federal and state law. Therefore, to be maximally effective, you need a written company policy tailored to your business. Our firm can help you implement a company policy that complies with federal and state laws and that helps protect your business from potential liability.

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Note: Footnotes have been omitted; a copy of the complete article is available upon request.