With advancements in technology, employees increasingly work non-traditional schedules, including from remote locations. These advancements provide the means to remotely monitor employees in both the office and remote locations. However, employer remote monitoring policies raise questions surrounding compliance with existing state and federal wiretapping laws, state statutory and common law surrounding privacy, employment discrimination laws and the National Labor Relations Act. Public employers must also comply with the Fourth Amendment.

Under the federal Wiretap Act, employers may not, absent consent, monitor employee telephone calls without a reasonable basis and the presence of a company-issued device, the less likely the employer’s monitoring will survive balancing in the totality of the circumstances.

In Ohio, no statute protects employees’ communications stored on employer-provided communications services, the SCA permits such review. However, the SCA protects employees’ privacy or regulates remote monitoring. Protections against surveillance are found in the Ohio Wiretap Act, which provides for the interception of a wire, oral or electronic communication. Employees in Ohio have no expectation of privacy in employer-owned office spaces, computers or desks that are accessible to other employees. However, Ohio recognizes four common law bases for invasion of privacy, including the wrongful intrusion into an employee’s private activities, which causes mental suffering, shame or humiliation to a reasonable person and the publication of an employee’s private affairs.

Electronic monitoring of employees must comply with anti-discrimination laws. Employers violate such laws when policies target, or disproportionately subject, protected classes to monitoring. Moreover, when electronic monitoring uncovers employee-protected complaints and traits, employers may not retaliate against complaining employees nor discriminate based on that protected trait.

Employers must comply with the NLRA in any workplace monitoring policies. The NLRA protects employees’ concerted activity from employer adverse action; prohibits employers from conducting surveillance over union organizing efforts; prevents employers from violating a Collective Bargaining Agreement; compels bargaining about monitoring policies when required; and protects employees’ Section 7 rights from employer policies which infringe upon those rights. Remote monitoring policies must account for these provisions.

Employers and employees alike should consider potential privacy implications. Employers should implement policies which communicate clearly the extent of employee monitoring practices. Employees should err on the side of caution when using employer-provided devices by not accessing information that they wish to keep private.