

# Legal Connections



POWERED BY THE COLUMBUS BAR ASSOCIATION

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## BALANCING EMPLOYER POLICIES AND EMPLOYEE RIGHTS: REMOTE MONITORING IN THE WORKPLACE

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 legitimate business purpose. Similarly, the Stored Communications Act prohibits employers from "intentionally access[ing] without authorization a facility through which an electronic communication is provided" to obtain, alter, or prevent authorized access to a wire or electronic communication while it is in electronic storage. If an employer's policies authorize review of communications stored on employer-provided communications services, the SCA permits such review.

However, the SCA protects employees' private, not public, communications which are stored on non-employer-provided systems, such as personal secure websites, social media pages and personal emails. When monitoring employee communications, the more



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personal and private employees' emails on a company-issued device, the less likely the employer's monitoring will survive balancing in the totality of the circumstances.

In Ohio, no statute specifically protects employee privacy or regulates remote monitoring. Protections against surveillance are found in the Ohio Wiretap Law, which prohibits the intentional 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.

### 80-90%

of the U.S. workforce would like to work remotely

### Only 7%

of U.S. employers offer the option to their employees



Global Workplace Analytics, 2018

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. ■

## STAYING OUT OF TROUBLE IN THE #METOO WORLD

The #MeToo rallying cry has led many victims of inappropriate workplace conduct to find their voices and to protest the mistreatment of women in every industry. Responsible employers have heard that cry, but often don't know how to respond. Here are three things you should do to promote a healthy workplace culture so you can retain talented employees and stay out of the headlines:



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**1. Revisit and refresh your policies. Do you have a policy prohibiting harassment?** If not, get one. If you do have a policy, how effective is it? Does it provide examples of the behavior that will not be tolerated so employees know where you draw the line? Does it provide multiple ways for employees to report concerns, so they can bypass an offending supervisor/manager? Does it provide an overview of the investigative procedure and detail the range of disciplinary responses, up to and including termination? Does it promise no retaliation for good faith complaints?

**2. Empower Your Employees.** Inappropriate workplace behavior impacts everyone. Encourage employees to report concerns, even if conduct is not directed at them personally, and to intervene whenever a situation feels uncomfortable. Bystander intervention can be as simple as interrupting two employees in a heated discussion and inviting one to grab coffee, or following up privately with an employee who seems visibly upset to offer support.

**3. Promote civility.** Don't just focus on ferreting out bad behavior, but praise and reward your employees for doing things that make the workplace one where people enjoy coming to work. Adopt a civility code. Encourage employees to greet each other with "good morning" or "good evening." Remind them that "please" and "thank you" go a long way. Take time to compliment someone for a job well done. When someone is speaking to you, put your phone down. Make eye contact and listen. These small courtesies make others feel valued and respected. ■

## EDUCATION & EVENTS

**Office Management/HR PREP**  
Tuesday, Feb. 19 • 3 – 4:30 p.m.  
Office Management/HR PREP, Session 1:  
Foundational HR - 1.5 CLE/NLT Hours

All classes listed are offered at the Columbus Bar Association offices, 175 S. Third St. Ste. 1100. To register, call 614-221-4112 or enroll online at [www.cbalaw.org](http://www.cbalaw.org).

**ATTEND**  
our 'What the Icons of Mount Rushmore can Teach Us About Law' CLE and learn what Presidents Washington, Jefferson, Lincoln and Roosevelt can teach today's lawyers. Visit [cbalaw.org](http://cbalaw.org) to register.

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## March 9 @ 6:00pm

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