

Locke Lord QuickStudy: Is New York's New Electronic Monitoring Law Employer-Friendly??

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Yesterday, November 8, 2021, Governor Kathy Hochul signed legislation ([S2628](#)) which requires New York employers who monitor employee telephone conversations, emails, and internet usage to provide notice of such monitoring to new employees and post a notice to all employees for viewing. One of the published justifications for the new law is “mak[e] sure that [employees] understand the consequences [if they engage in] inappropriate internet activity.” But two other justifications specified in the legislation are employer-friendly: “employees will be less likely to undermine company standards” and “[c]ompanies will retain the right to monitor computer usage” provided employees are informed of the monitoring. While some state legislatures have considered passing laws to limit employer monitoring, this new law in New York goes in the opposite direction and tries to balance employee privacy concerns and employer rights.

The new law requires employers to provide prior written notice upon hiring to all employees who are subject to electronic monitoring, and to retain acknowledgment of the employee's receipt of the notice (either in writing or electronically). This is hardly a burden for most employers to include in the new employee packet. Distribution at that time should suffice under the “upon hiring” wording of the law, although the words in the statute are imprecise on the timing of such notice.

Employers are also required to post a notice of electronic monitoring “in a conspicuous place which is readily available for viewing by its employees who are subject to electronic monitoring.” Most employers will likely post the notice in the same location where they display all other required notices (i.e., minimum wage, discrimination, paid family leave, etc.), so this posting is unlikely to be burdensome.

There is no provision in the law that the New York Department of Labor will issue a form notice, but it may do so at some point before the law becomes effective in 180 days (in May 2022). However, the statute itself contains language that can be used as a notice:

“Any and all telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio or electromagnetic, photoelectronic or photo-optical systems may be subject to monitoring at any and all times and by any lawful means.”

Some employers are likely to include the notice in their employee handbook. Most companies currently have some language in their handbooks that electronic communications and access are subject to monitoring. Therefore, adding the italicized words above is likely to suffice in terms of a notice for employees.

A provision in the new law exempts electronic monitoring “solely for the purpose of computer system maintenance and/or protection.”

The law does not provide for a private right of action. Instead, it states that the Attorney General may enforce the law against employers who are non-compliant. The maximum civil penalty is \$500 for a first offense, \$1,000 for a second offense, and \$3,000 for subsequent offenses. These penalties are modest, and once an employer who violates the law is notified by the Attorney General of non-compliance, subsequent violations are not likely to occur.

Some employees in New York who have been disciplined or terminated for excessive personal use of the internet or email communications may try to use the law to prevent employers from relying on information secured by the employer through monitoring if the notices were not provided. This is another reason for employers in New York to welcome and comply with this new law: compliance with it will make it more difficult for workers to argue that information secured by employers through electronic monitoring cannot be used to justify discipline or termination.

One caveat: Nothing in the new law protects employers from any federal laws to the extent they prohibit the improper interception of electronic communications including those on an employee’s personal devices. It may be wise for New York employers to secure from each employee an acknowledgement form whereby the employee consents to the employer’s lawful monitoring and accessing of all forms of electronic communications on all devices used by the employee for work-related purposes.

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