

## Employment and Labour

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Privacy Issues In  
The Workplace

Some Legal Implications  
Of Workplace Surveillance

Methods of employee surveillance and workplace monitoring have been adopted by many employers who already use video cameras and other tools to keep watch over the workplace. However, as new technologies are developed, and the need to ensure a secure workplace increases, so have the various means by which an employer can and has reason to keep tabs on its employees. Surveillance methods which are available to the employer range from the more traditional video cameras and telephone-monitoring devices to more advanced methods such as electronic access devices and software which may be used to track electronic mail or block internet access. Regardless of how an employer intends to keep watch over its workplace, if any workplace surveillance is to be contemplated, consideration must be given to ensure that the proper balance is found between an employer's right to manage and secure its workplace and the employee's (albeit limited) right to privacy in the workplace.

### The Employer's Right to Know

Courts and adjudicators have recognized that employers have a valid interest in monitoring the workplace. Whether for productivity or for security reasons, an employer can protect his economic interests by maintaining an artificial presence in the work environment. Employers also undertake monitoring of workers in order to protect themselves from potential legal liability as may arise when, for example, an employee downloads or distributes pornographic or discriminatory images on his computer. Such action can give rise to a harassment claim in which the employer can share the responsibility for allowing a hostile work environment to be created. While the employer's right to know what is going on in his workplace has been established, important limits to this right have also been laid out and should not be overlooked.

### The Employee's Right to Privacy

Employees have a limited right to privacy in the workplace. This right finds its origin in a variety of sources, including collective agreements, provincial or federal statutory provisions and common law. Courts have provided different interpretations of the limitations on the scope of this privacy right depending on the type of surveillance used by the employer and the circumstances surrounding the surveillance, including the grounds upon which the employer decides to implement surveillance and the reasonable expectations of the employees in each case.

The scope of an employee's privacy rights have been considered in circumstances where employees have complained that their right to privacy has been infringed. The result of this consideration has been a determination that an employee's right to privacy is not absolute. The limitations on this right are determined by the employee's reasonable expectations within the particular context of each situation. While reasonable expectations will be decided on the facts of each case, some helpful guidelines have been provided by case law in this area.

### Reasonable Expectations of Privacy

A 1997 British Columbia decision considered the complaint of an employee who had been videotaped sleeping on the job on a regular basis. In this case,

the employee was found to have had no reasonable expectation of privacy given the activity in which he was engaged and the fact that the actions were done on company time and on company property. Other decisions have found that employer surveillance which is conducted outside of the workplace may violate an employee's right to privacy, particularly if other methods are available to obtain the required information about the employee. American decisions in this area indicate that employees should have no reasonable expectation of privacy in relation to e-mail communications despite the use of passwords or assurances given by the employer that such communications would not be used against them.

Aside from the common law issue of determining an employee's reasonable expectations of privacy, employers are also subject to specific statutory requirements in this area. For example, the *Telephone Act* and the *Criminal Code* both prohibit "eavesdropping" on private communications. The "communications", as defined in these statutes, could extend to internet and e-mail, although no court or adjudicator has yet to reach this explicit conclusion. As a result of these statutory limitations, employers can lawfully monitor the frequency, length, destination or origin of these communications, *but (potentially) not their content*, unless there is consent by one of the parties or the employees have been advised in advance that such monitoring may occur.

## An Ounce of Prevention

Employers can avoid potential problems arising out of employees' privacy rights in the workplace by taking some preliminary steps and considering the following points:

- Establish a comprehensive written policy addressing what expectations employees should have regarding their right to privacy and bring that policy to the attention of all employees. Such a policy should describe exactly what measures are or may be taken by the employer to monitor the employees' activities. For example, employees should be informed that their e-mails may be monitored from time to time or that surveillance cameras have been installed to ensure the safety of workers.
- Ensure that any policy statement describes the purpose of any surveillance or monitoring, and

includes a statement of what appropriate uses can be made of the employer's resources, such as telephones or computer programs.

- Consider whether the written policy should also include the employee's specific consent to surveillance and monitoring. By obtaining such consent, the employer will be helping to ensure that the employee's reasonable expectations of privacy correlate with the employer's intentions of exercising their right to reasonably monitor workplace activities.
- Consider any rights or prohibitions provided for in existing collective agreements or employment contracts, before taking any steps to introduce any policies or to introduce surveillance mechanisms into the workplace.
- If video surveillance is to be introduced, remember that case law indicates that an employer must have reasonable grounds to establish video surveillance, and that the intrusiveness of any such surveillance should be kept to a minimum. Accordingly, rotating cameras and open surveillance are considered preferable to fixed cameras and surreptitious surveillance.
- Remember that the employer must have even more compelling grounds to engage in any surveillance *outside of the workplace*, as an employer will be extending his right to know beyond the place of employment and into the employee's personal life.

Should you require any assistance with the drafting, review or enforcement of any privacy or other policies in your workplace, do not hesitate to contact any of the following lawyers practising in Goodmans' Employment and Labour Group:

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