

Department of Legislative Services
Maryland General Assembly
2005 Session

FISCAL AND POLICY NOTE

House Bill 686
Economic Matters

(Delegate Howard, *et al.*)

Labor and Employment - Electronic Monitoring of Employees

This bill prohibits an employer from electronic monitoring of an employee without providing the employee with a specified notice. The notice must state: (1) the form of communication or other activity that will be monitored; (2) the means by which monitoring will be accomplished; (3) the frequency of monitoring; and (4) how the information obtained will be stored, used, or disclosed. The notice requirement may be met by inclusion in an employee handbook. Monitoring may be conducted without notice if there are reasonable grounds to believe that the employee is engaged in unlawful conduct and monitoring will produce evidence of the conduct.

Fiscal Summary

State Effect: Any change in State activities would not materially affect State finances.

Local Effect: Any change in local activities would not materially affect State finances.

Small Business Effect: Minimal.

Analysis

Bill Summary: Electronic monitoring means the collections of individually identifiable information concerning employee activities or communications through the use of an electronic device, including a computer, computer software, or other computer program. An employer includes:

- a person engaged in a business, industry, profession, trade, or other enterprise in the State;
- the State;
- a county; or
- a municipal corporation.

Current Law: The legality of whether an employer is able to monitor the electronic communications of its employees is not clear. Generally, since the employer owns the computer network and the terminals, it is free to use them to monitor employees. Employees are given some protection from computer and other forms of electronic monitoring under certain circumstances; for example, a union contract may limit the employer's right to monitor. Public employees have minimal rights under the U.S. Constitution.

The Fourth and Fourteenth Amendments to the U.S. Constitution protect a government employee from unlawful searches and seizures by the federal or state governments. A government must honor the employee's constitutional rights to privacy when searching employee work space or other actions which may infringe on their rights, such as monitoring e-mail and Internet usage. However, neither the U.S. Constitution nor most state constitutions establish rights of privacy for employees of private employers.

Before a government may lawfully intrude upon an employee's privacy, the intrusion must be reasonable. A search is reasonable if it does not infringe on the employee's reasonable expectation of privacy in the search. Whether or not a search intrudes upon the reasonable expectation of privacy is determined on a case-by-case basis. It depends on the circumstances surrounding the search. Courts balance the employer's justification for the search, which includes the need for supervision, control, and the efficient operation of the workplace, against the employee's legitimate expectations of privacy.

Courts have routinely given public employers discretion to search employee computers and other work areas, as long as the employer could articulate a legitimate reason for the search. Some states have constitutional provisions which also provide some employee privacy protection. To date, only California has attempted to extend this protection to private-sector employees. However, the California Superior Court has refused to recognize constitutional protection from e-mail monitoring by private employers.

Background: Two states, Connecticut and Delaware, require employers to give notice to employees prior to monitoring e-mail communications or Internet access. Delaware law requires the employer to provide a one-time notice to the employee, includes exceptions for processes performed solely for computer maintenance and/or protection and court

ordered actions, and provides for a civil penalty of \$100 for each violation. Connecticut law requires notice to employees of the types of monitoring which may occur; has an exception for reasonable grounds if the employer believes the employee is engaged in unlawful conduct; and provides for civil penalties of \$500 for the first offense, \$1,000 for the second offense, and \$3,000 for subsequent offenses.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Department of Labor, Licensing, and Regulation; National Conference of State Legislatures; Privacy Rights Clearinghouse (Fact Sheet 7: Workplace Privacy); Westlaw (29 Okla. City U.L. Rev. 15); Department of Legislative Services

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