



Legal Alert

BIG BROTHER, HOLD ON: NEW YORK EMPLOYERS MUST ADVISE EMPLOYEES AND PROSPECTIVE EMPLOYEES IF ELECTRONIC ACTIVITIES WILL BE MONITORED

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George Orwell would be proud. The 'Big NYS Legislature and Governor' just put the brakes on Big Brother, kinda.

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On November 8, 2021, Governor Kathy Hochul signed Chapter 583, creating Civil Rights law § 52-c. The new provision, effective six months after enactment (so, May 7, 2022) requires all private employers engaging in telephonic/electronic monitoring to give prior notice to employees.

Under the new provision, electronic monitoring includes monitoring or otherwise intercepting employee telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage. Employers engaged in this type of monitoring must provide notice upon hiring, annually and post notice of the monitoring in a conspicuous place accessible to employees (think bulletin board where minimum wage and other labor law notices are posted). Employees/prospective employees must acknowledge receipt of the notice. Notices must also explain the means of monitoring, the frequency of monitoring, and the manner in which information from such monitoring will be collected, stored, and used. Violations of the notice requirement are subject to civil penalties, enforceable by the Attorney General. An initial violation will cost the employer up to \$500 in civil penalties and up to \$1,000 and \$3,000 for second and third violations consecutively.

As a general rule, employees have a limited expectation of privacy in the workplace. Employers have long benefited from informing employees of this fact including that personal activities should be curtailed at work. Yet, not all have. The new law infuses that mandate on all NYS private employers. That is, employers who monitor employee phone/electronic activity must be advised of this fact, in writing, in advance and annually.

The law is laudable in intent – advising employees their phone/email/electronic communications are not private in the workplace. Allowing employees to understand the consequences of inappropriate internet use and deterring employees from such inappropriate use makes for a more productive work environment. (The new law does not apply to processes that employers undertake to manage the type

or volume of emails, voicemails, or Internet usage for the purpose of computer system maintenance and/or protection).

The law is also unclear. Many employers do not monitor phone, internet, email use on a regular basis but have the ability to when necessary (e.g. investigation of improper behavior). Argument could be made that this is not included in the law. Employers probably do not want to risk relying on this seeming loophole. Doing so could expose an employer to an enforcement action. Though in artfully rafted, it seems the law is intended to apply to such infrequent, possible monitoring. Employers would do well to notice employees of this possibility.

If you have any questions, please contact Douglas E. Gerhardt, Jessica Simonetti or the Harris Beach attorney with whom you usually work.

This alert does not purport to be a substitute for advice of counsel on specific matters.

Harris Beach has offices throughout New York state, including Albany, Buffalo, Ithaca, Long Island, New York City, Rochester, Saratoga Springs, Syracuse and White Plains, as well as New Haven, Connecticut and Newark, New Jersey.