

Dallas Business Journal

'Spying' on employees is legal in some cases

Dallas Business Journal - February 9, 2007 by Ted Anderson Special contributors

The board scandal at Hewlett-Packard focused the media's attention on private investigators who use false pretenses to obtain employee personal phone records. It horrified many to learn that, not only that pretexting occurred in the business place, but that it might be legal.

In Texas it is legal for a party to a telephone conversation to tape record it. If someone is not a party to a conversation, it is generally illegal under both Texas and federal law to tape the conversation. But that has not stopped companies from attempting to use the "business use exception" to the law.

One court has permitted regular "surreptitious" monitoring of employee telephone calls when all employees were notified in writing about the monitoring. Although, this would be limited to company phones.

The Electronic Communications Privacy Act also protects e-mail messages from illegal interception and disclosure. But today, many companies gain access to their employees e-mail for a variety of legal reasons, including system maintenance, message routing, trouble shooting, protection of trade secrets and quality control.

In Texas, courts have held that employees do not have a reasonable expectation of privacy in the contents of workplace e-mail messages that would preclude the employer from monitoring the messages.

The ECPA also specifically excepts from its coverage "internal e-mail, e-mails intercepted for business use and where prior consent has been given." As a result, companies routinely review employee e-mails, whether they are saved or deleted, even when they originate from private e-mail accounts on company computers.

Other tactics

Employers are permitted to administer drug tests to employees as long as the test is administered consistently.

On the other hand, The Employee Polygraph Protection Act prohibits private employers from using lie detector tests in most situations. (Polygraphs are permissible in investigation of workplace theft and by security and drug firms.)

No statute prohibits video surveillance of employees, which should increase as relative costs go down. Moreover, there is little reason to believe that the Texas Supreme Court would prohibit video surveillance unless an employee could demonstrate an expectation of privacy in the workplace measured against the reasonableness of the surveillance.

"Pretexting" is a private investigator calling up a phone company and pretending to be an employee or director in order to obtain the phone records for that employee or director.

The private investigator lies to the phone company, identifying himself as the employee or director and uses other identifying information (phone number, Social Security number and other information that an employer usually possesses about an employee) in order to deceive the phone company into revealing phone record information. Allegedly this is what occurred at Hewlett-Packard.

Pretexting has been a method of investigators for years. Examples of permissible pretexting by investigators include calling a house and pretending to be a courier to find out if someone lives there, posing as an employee in a workplace to probe theft, calling a subject's neighbors and saying

they are listed as references in an attempt to get medical information.

While legislators sprint to keep legislation up to speed with technology innovation -- and subterfuge, Texas passed a statute starting in 1999 and amended in 2003 that is right on point.

Under section 32.51 of the Penal Code Fraudulent Use or Possession of Identifying Information, it is a crime if "the person obtains, possesses, transfers, or uses identifying information of another person without the person's consent and with intent to harm or defraud another."

Identifying information includes telecommunication identifying information and name, Social Security number or date of birth, among others.

While it may be permissible for a company to listen in on the phone calls of its employees, search through their e-mail, and administer drug tests, they cannot use pretexting to get the personal phone records of an employee.

In addition, Texas Courts recognize individual privacy against unreasonable intrusion into one's physical solitude, seclusion or private affairs.

Individuals can bring a law suit if a company investigation amounts to a prying or intrusion, which is highly objectionable to a reasonable person, into a place or into affairs that are private and entitled to privacy, and the employee has a reasonable expectation of privacy in the area searched or matters investigated.

This right has limited employer's "lie detector" policies and wiretapping the private phones of employees, but little else.

There are specific statutory limitations to employers spying on employees. What happened at Hewlett-Packard would be illegal in Texas, but employees and directors should beware. In Texas the employee expectation of privacy is extremely limited. Big Brother is your employer and your employer is watching.

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