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New York Requires Advance Notice to Employees Regarding Electronic Monitoring

On November 8, 2021, New York Governor Kathy Hochul signed into law AB 430/SB 2628 (CH 583), (the Act), in relation to electronic monitoring by employers. The law requires private employers that monitor electronic communications to provide advance written notice to all employees to inform them of the types of electronic monitoring that may occur.

The notice must be in writing, which may be in electronic form. The notice must also be acknowledged by the employee, in writing or electronically. Records of employee acknowledgements should be retained by the employer to demonstrate compliance with the Act.

The law provides that "Any employer who monitors or otherwise intercepts telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage of or 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, shall give prior written notice upon hiring to all employees who are subject to electronic monitoring."

"Employer" means any individual, corporation, partnership, firm, or association with a place of business in the state. It shall not include the state or any political subdivision of the state.

Each employer must also post the notice of electronic monitoring in a conspicuous place, which is readily available for viewing by its employees who are subject to electronic monitoring.

The written notice must advise employees that "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."

The New York Attorney General will enforce these provisions. Employers found to be in violation can be subject to civil penalties of \$500 for the first offense, \$1,000 for the second offense and \$3,000 for the third and each subsequent offense. It is not clear whether an offense might be considered separate with respect to each employee.



Sponsors of the legislation explained that notifying employees of computer monitoring protects employee privacy by making sure that employees understand the consequences of inappropriate internet activity. They noted that, according to a survey, violation of company policy and excessive personal use were the two main reasons for which employees were terminated for Internet misuse.

"By making guidelines of appropriate and inappropriate Internet use public, employees will be less likely to undermine company standards."

The Act provides that these provisions do not apply to processes that are designed to manage electronic mail or telephone voice mail or internet usage, that are not targeted to monitor or intercept the electronic mail or telephone voice mail or internet usage of a particular individual, and that are performed solely for computer system maintenance and/or protection.

The Act will take effect on May 6, 2022.

Generally, following recent state laws such as California's Consumer Privacy Act, many other states are considering legislation that may affect employers' rights and obligations in monitoring employee communications and activity. Employee data has generally been exempted from most elements of comprehensive privacy laws enacted to date. In California, despite the partial exemption for employee data, it is still a requirement to provide notice to employees of the types of data collected and the purposes for which it is collected, which could include monitoring, quality control, etc. Some privacy proposals could restrict employer monitoring practices.

ADP® will be following such initiatives in order to keep clients informed of relevant changes to applicable laws.

Providing notice of employer monitoring of employee communications and activities is already a best practice for many employers. Affected organizations should consult with appropriate legal counsel, as well as other departments, such as Human Resources.

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