National Protective Security Authority

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USA: Relevant legislation

All (or majority of) States

We have identified the following key pieces of legislation which are applicable to employee IT monitoring in the US. Note that there is other legislation which is applicable which we have not included in this document.

- **Fourth Amendment of US Constitution**
  - Contains protections against unlawful (governmental) searches and seizures;
- **National Labor Relations Board** (NLRB) gives individuals the right to protected 'concerted activity' speech – which includes joining together in cyberspace to improve their lives at work. Protected concerted activity speech:
  - includes a right to address and share information about pay, benefits, and working conditions with co-workers on Facebook, YouTube and other social media;
  - includes griping about some aspect of work if it has some relation to group action; and
  - does not include activity where the individual says things about their employer that is egregiously offensive or knowingly and deliberately false.
- **Computer Fraud and Abuse Act** (CFAA)
  - It is a crime to access a protected computer without proper authorisation.
- **Electronic Communications Privacy Act** (ECPA)
  - Prohibits third parties from intercepting or disclosing wire, oral or electronic communications without authorisation.

Selected States

California

- **Constitutional Right of Privacy**
  - This right extends to the private sector but it is not as far reaching as under EU legislation;
  - For the most part, employers are free to monitor company equipment with or without notice or consent of employees, although it is best practice to affirmatively negate any expectation of privacy (there are exceptions to this including privileged attorney-client communications' data); and
  - Bring Your Own Device – the ability to use a personal phone for business purposes is regarded as a privilege, not a right, and therefore may be monitored.
- **California Penal Code**
  - All parties in a conversation must consent to recording or interception of such conversations if there is a reasonable expectation of confidentiality.

- **California Labor Code**
  - Employer cannot inquire into applicant's or employee's compensation history;
  - Employer cannot request/access a job applicant's social media, except in limited circumstances;
  - Employer cannot discriminate based on 'lawful conduct occurring during non-working hours away from the employer's premises'.

New York

- **New York Penal Law**
  - Permits the intentional recording of conversations provided at least one of the parties consent to the recording.
- **New York Labor Code**
  - Prohibits discrimination against an employee for his or her participation in 'legal recreational activities outside work hours'.
  - Prohibits an employer from inquiring into an employee's prior compensation history until after an employment offer has been made.

Principles deduced from case law

The US has no national data privacy regime. For the most part data privacyin the US is more limited than in the EU.

- Employees should be made aware of monitoring.
- Policies to explicitly prohibit personal use of systems are acceptable. If there is not a policy or it is ambiguous this is likely to prove problematic for the organisation in, for example, an unfair dismissal case which was based on personal use.
- There have been unfair dismissal claims denied based on the fact that in communicating on a work computer (for private purposes) they could not reasonably have expected that the communication would remain private.
- Employees appear to be well protected in terms of their right to 'protected concerted activities' – they may be somewhat offensive, but assuming they refer to a group actions (e.g. Unions) to change something about their employment terms, then they are likely to be within their rights to post.

The future

‘**Ban the box’ legislation**: Removal of the checkbox on application forms which states whether an applicant has a criminal record. Some states have introduced legislation to remove this box.

The National Labor Relations Board has become increasingly conservative. It is likely that the very broad social media ‘concerted activity’ protections will be pulled back considerably.

GDPR: The US is currently recognised as providing adequate protection of personal data under GDPR via the Privacy Shield Framework (as distinct from an adequacy decision). Organisations in the US should maintain compliance with this framework, which provides strong obligations on companies receiving personal data from the EU. It also includes safeguards on US government access to such data.

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