

## Can I Read My Employee's Emails? New York Law Will Require Advance Notice Effective May 2022

By **Julie Levinson Werner** and **Christopher Dernbach**

From time to time, situations arise that prompt an employer to want to review an employee's emails and other electronic communications. In matters involving internal investigations, concerns about a breach of an employee's legal obligations to the employer, and for other business reasons, an employer may decide that it wants to review an employee's electronic communications. Effective May 7, 2022, all New York employers, regardless of size, will need to provide written notice to new hires before engaging in "electronic monitoring."

### When Does the Law Apply?

Effective May 7, 2022, when an employer with a place of business in New York "monitors or otherwise intercepts" an employee's telephone conversations, emails, internet access, or internet usage, advance notice is required. There is no distinction based on the size of the employer. The law does *not* include any prohibitions on electronic monitoring; it merely requires advance notice and acknowledgment.

#### **Exception:**

The law *does not apply* to processes that are

- (1) Designed to manage the type or volume of incoming or outgoing email, voicemail, or internet usage
- (2) Not targeted to monitor or intercept the email, voicemail, or internet usage of a particular individual
- (3) Performed solely for the purposes of computer system maintenance and/or protection

### What Is Required?

Where the law applies, the employer must give **written (or electronic) notice upon hiring** to all employees who are subject to the electronic monitoring. That notice must be **acknowledged by the employee in writing or electronically**. While the law does not formally require employers to provide written notice to current employees, it is

still ideal for an employer to include policy language in its employee handbook that it distributes to all employees who work in New York.

More specifically, the law requires employers to notify new 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 computer, telephone, wire, radio, or electromagnetic, photo electronic, or photo-optical systems, may be subject to monitoring at any and all times and by any lawful means.

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

### Penalties for Violations

The law is enforceable by the New York attorney general. Violators are subject to a \$500 fine for the first offense, a \$1,000 fine for the second offense, and a \$3,000 fine for the third and all subsequent offenses. There is no private cause of action enabling an employee to bring suit for a violation.

### Bottom Line

Impacted employers must (1) provide notice of electronic monitoring to all new hires, (2) receive an acknowledgment of that notice, and (3) post a notice of electronic monitoring in a conspicuous place.

If you need assistance navigating the complex employment laws governing the workplace, please contact Lowenstein Sandler's Employment Counseling & Litigation practice group.

# Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

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