

S.2628 (Sanders) / A.430 (Rosenthal)

STAFF CONTACT : Frank Kerbein | Director, Center for Human Resources | 518.455.7180

BILL S.2628 (Sanders) / A.430 (Rosenthal)
SUBJECT Notice of Types of Electronic Monitoring
DATE May 12, 2021
OPPOSE

This bill would require new employee notification and a workplace posting notifications if employers electronically monitor employees in the course of business. It would also require a written employee acknowledgement. The Business Council opposes this bill as being duplicative of existing laws and regulations.

Currently, there are both federal and state requirements in place that protect employee privacy and require notification. New York's Wiretapping Law, NY Penal law section 250.05, prohibits monitoring, intercepting or accessing electronic communication without consent of one of the parties. Unlike federal law, New York's Wiretapping Law does not have a business extension exception. Therefore, to avoid criminal penalties, employers must obtain consent from employees to monitor, intercept and access their electronic communications.

On the federal level, the Electronic Communications Privacy Act (ECPA) sets out the provisions for access, use, disclosure, interception and privacy protections of electronic and wire communications. The ECPA encompasses transmissions of electronic data by computer and prohibits both the interception of electronic communications and access to stored electronic communications. Regarding the monitoring of employee phone calls and e-mail, ECPA creates civil and criminal liability for anyone who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral or electronic communication."

Generally, two exceptions are available to an employer who wishes to monitor employee activity: (1) the consent exception, and (2) the business extension exception.

The Consent Exception: Interception of a communication is allowed when one of the parties to a communication has given prior consent. Since the intent of the law is to protect individual privacy, expressed consent to be monitored is

obtained by the employer, such as in the form of a signed consent at the start of employment. This is done because implied consent is difficult to prove by the employer.

The Business Extension Exception: The business extension exception does not require consent. However, there are very specific conditions that must be met to qualify for this exception. Specifically, only certain types of recording instruments are covered by the exception. Generally, the business extension exception can only be claimed for monitoring performed by and recorded in the ordinary course of business and generally, an employer may monitor the phone calls, e-mails, or computer usage of their employees for legitimate business purposes (e.g., customer service, quality control, etc.), provided the employee has knowledge of the policy. Also, personal calls generally may not be intercepted in the general course of business except to the extent necessary to guard against unauthorized use of the telephone or to determine whether a call is personal or not.

The requirements and protections for employees are already in place. There is no justification for these new mandates. Legislation like this simply adds to the already burdensome business environment in New York State.

For these reasons, The Business Council, on behalf of its more than 2,300 members opposes this legislation and respectfully urges that it not be enacted by the New York State Legislature.