

Legal Advisory

IDEAS AND STRATEGIES FOR YOU AND YOUR BUSINESS / THIRD QUARTER 2009

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BACKING OUT

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Legal Briefs

ELECTRONIC PRIVACY ISSUE AT WORK

Frequently, your employees need their computers—including access to the Internet and e-mail accounts—to do their jobs properly. But you may be concerned that their level of personal use has exceeded reasonable bounds. Employees may be “tweeting” or checking their fantasy sports teams when they should be working.

Even worse, it is possible that some employees are exposing proprietary information about your company online. So you want to keep a closer watch on proceedings through electronic means. But are your methods legal?

It is relatively safe to say that the legislation in this area has not kept up with technology. The primary applicable federal statute, the Electronic Communications Privacy Act (ECPA), was enacted back in 1986 (although it has been modified since then). The law has also been coordinated with the USA PATRIOT Act.

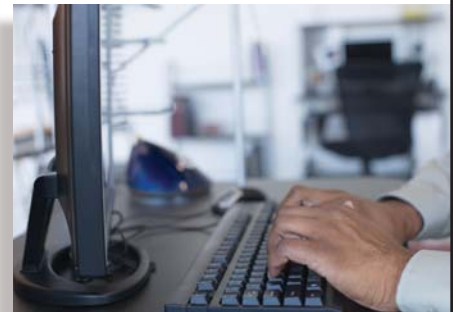
The ECPA was initially intended to govern third-party interceptions of electronic communications. It im-

poses civil and criminal penalties on anyone who intentionally intercepts, uses or discloses wire, oral or electronic communications. For this purpose, an “electronic communication” is defined as “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo optical system that affects interstate or foreign commerce.” Thus, this legislation appears to have a wide application.

Under the ECPA, employers may be able to monitor electronic communications if the monitoring occurs in the ordinary course of business or it has the implied consent of employees.

On the other hand, state law may provide greater protection for employees. Some states recognize a right of privacy that includes the right to be free from physical or electronic intrusions into a person’s private affairs.

(see Electronic privacy issue on next page)



BACKING OUT OF THE DEAL

Suppose you were eager to “sign on the dotted line” following a persuasive sales pitch by an aggressive salesperson. But now that you have had a couple of days to mull over the arrangement, you realize it is a mistake. Are you out of luck?

Not necessarily. You still may be able to void the contract if you act quickly enough. Depending on the applicable federal and state law in this area, you may be able to benefit from a legal concept called a right of rescission. In effect, this is the right to call off the deal during a stated period of time.

As a prime example, the Truth in Lending Act of 1968 provides a three-day “cooling-off period” for most consumer credit transactions (other than home purchases) that are secured by your home. For instance, you have three business days to change your mind about taking out a home equity loan.

Within 20 days after the lender receives the notice of rescission, it must return all funds paid as part of the transaction. The lender also must release any interest in the home that was used as security for this purpose.

In addition, many states have laws protecting consumers from impulsive decisions, including the following:

Insurance products: This includes not only life and health insurance sales, but also annuities and income continuation policies. The rescission period varies from state to state, but you can expect a minimum of ten days.

Health and fitness clubs: Some states even allow you to void a membership agreement after the cooling-off period has expired (e.g., if your physician says you can no longer use the facilities).

Real estate developments: Most states require real estate developers to prepare an offering plan or prospectus. The same laws that require a buyer to receive full disclosure from the developer also enable the buyer to cancel within a certain period of time. This period varies under state law, but is generally at least ten days.

Despite these “safety nets,” you are better off doing things right in the first place. For example, if you are buying a home, make sure that the contract permits you to rescind the deal if an inspection shows undisclosed damage or if favorable financing does not come through. 📌

ELECTRONIC PRIVACY ISSUE

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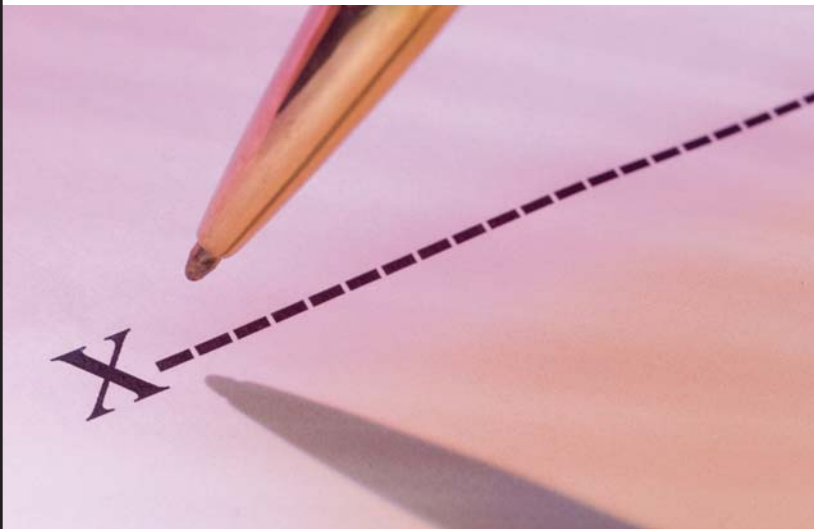
However, state law can vary widely in this area. As a result, employers should be cautious and conservative when monitoring employee e-mail. Before an employer begins to conduct surveillance of employees, it should ask these questions:

- ❖ Is the surveillance necessary in pursuit of a valid business purpose? If an employee is reasonably suspected of theft or other wrongdoing, the surveillance may be justified. Conversely, indiscriminate surveillance without a business purpose is more difficult to justify and may be illegal.

- ❖ Is the type and extent of surveillance the minimum needed to achieve the business purpose? Assuming the surveillance is necessary, it may be considered an invasion of privacy if it is excessive or unnecessarily intrusive.

- ❖ Have employees been warned of the possibility of surveillance? If no warnings are provided, a court may determine that the employee had a reasonable expectation of privacy that was invaded by the employer.

The laws relating to electronic communications are still evolving. Consult with a legal adviser regarding your particular circumstances. 📌





Keeping Your Eyes on the Road

Can you talk on your cell phone or text while you are driving? Currently, drivers are prohibited from using hand-held cell phones in five states (California, Connecticut, New Jersey, New York and Washington) and the District of Columbia while ten states (Alaska, Arkansas, California, Connecticut, Louisiana, Minnesota, New Jersey, Utah, Virginia and Washington) and the District of Columbia have enacted a ban against texting for drivers.

Even if state law does not prohibit such actions, you may be held liable for a traffic accident caused while you were using your cell phone, not to mention the risks of personal injury to yourself and others. The best approach: Just don't do it.

NEW LAW BOOSTS TAX SAVINGS

The new economic stimulus law—the American Recovery and Reinvestment Act of 2009—contains a wide range of tax breaks for individuals. Here is an overview of several key provisions.

Making Work Pay credit: An employee or self-employed individual may claim a credit equal to the lesser of 6.2% of earned income or \$400 for single filers (\$800 for joint filers). This new credit, which is available for 2009 and 2010, phases out if your modified AGI (MAGI) is \$75,000 or more for single filers (\$150,000 or more for joint filers).

Alternative minimum tax: Congress “patched” the alternative minimum tax (AMT) again for 2009 by extending the use of personal credits to offset AMT liability and slightly increasing the exemption amounts.

Small-business stock: Previously, an investor could exclude tax on 50% of the gain on the sale of “qualified small-business stock” (QSBS). The new law increases the tax exclusion to 75% for QSBS acquired after February 17, 2009, and before January 1, 2011.

New car deductions: Under the new law, you can claim an above-the-line deduction for the sales and excise taxes attributable to the first \$49,500 of a new vehicle's purchase price. The deduction is phased out for an MAGI exceeding \$125,000 for single filers and \$250,000 for joint filers. It is only available for purchases between February 17 and December 31, 2009.


Education credit: The Hope education credit is enhanced for 2009 and 2010 and renamed the

“American Opportunity Tax Credit.” For starters, the maximum credit is increased to \$2,500 (up from \$1,800 for 2008) and will be available for all four years of study. Furthermore, the phase-out thresholds are boosted to \$80,000 of MAGI for single filers and \$160,000 for joint filers.

First-time homebuyer's credit: The new law increases the maximum credit to \$8,000 (from \$7,500 for 2008) for purchases after December 31, 2008, and before December 1, 2009. Unlike the credit for 2008, you are not required to repay the credit over 15 years if you live in the home at least three years. But the credit for 2009 still phases out for an AGI exceeding \$75,000 for single filers and \$150,000 for joint filers.

Unemployment benefits: For 2009, no income tax is imposed on the first of \$2,400 of unemployment benefits received by a worker who loses his or her job.

COBRA benefits: An individual who suffers an involuntary job loss between September 1, 2008, and December 31, 2009, can receive COBRA coverage by paying only 35% of the required amount. Employers paying the 65% balance can receive an employment tax credit or reduce their payroll tax deposits.

Energy incentives: Finally, the new law includes a slew of tax benefits for making various energy-saving improvements. More details are available at www.energystar.gov. 



CREATE A DYNASTY TRUST TO LAST

If you have accumulated significant wealth during your lifetime, you can create your own personal “dynasty.” But the trick is to minimize estate- and gift-tax liability for intra-family transfers.

For starters, the estate-tax exemption effectively shelters up to \$3.5 million of a decedent’s assets from estate tax in 2009, in addition to amounts passed on to your spouse under the unlimited marital deduction. (The estate tax is currently scheduled to be repealed in 2010, only to be revived in 2011 with a \$1 million exemption.) Also, the tax law imposes a “generation-skipping tax” on most transfers that skips a generation, but there is a generous exemption equivalent to the estate-tax exemption.

Another potential way to minimize the tax ramifications for affluent families is to set up a “dynasty trust.” Typically, a dynasty trust is set up during the grantor’s lifetime (an “inter vivos trust”). However, it can also be established through a will as part of an estate plan.

How it works: Depending on the terms of the trust, the income is accumulated or is paid out on behalf of the trust’s beneficiaries—children, grandchildren and possibly even more remote descendants. The trustee may also have discretion to invade principal in certain circumstances.

As long as the assets remain in the trust, they do not become part of a beneficiary’s taxable estate when he or she dies. So the wealth in the trust can compound over three generations or more without any current tax.



For instance, a business owner launching a new venture might want to contribute a portion (or all) of the equity in the start-up enterprise to a dynasty trust. If the business turns into a financial success, all of its value and future appreciation is shifted to the children and grandchildren free of estate-tax erosion.

Be aware, however, that state law may have an impact in this area. Be sure to discuss your situation with an estate-planning expert.

There are other reasons besides taxes for establishing a dynasty trust. Because the assets are controlled by the trustee, the trust beneficiaries cannot embark on any wild spending sprees. Also, neither creditors nor an ex-spouse in a divorce proceeding can reach the trust assets.

Reminder: This is not a do-it-yourself proposition. Professional assistance is strongly recommended. 📌

B R I E F S

◆ **Truck Stop**—In a new case, a disabled truck driver quit his job and filed a discrimination lawsuit. He claimed that he was paid less than other drivers even though he had more seniority. But the company manual clearly indicated that salary was not based on length of service. Instead, the company focused on profitability, performance and other factors. **Result:** The Seventh Circuit Court dismissed the claim.

◆ **Investment Scams**—Bernard Madoff and others have been accused of swindling investors in so-called Ponzi schemes. Now a new IRS ruling says you can deduct such a loss as a theft loss rather than a capital loss. The loss is deductible in the year it is discovered without applying the usual limits. Normally, casualty and theft losses must be reduced by \$100 per event (\$500 in 2009) and 10% of your AGI.

◆ **Asleep on the Job**—Company supervisors suspected that an employee was sleeping in his cubicle. So they set up a surveillance camera that caught the employee in the act. When he was fired, he sued the employer, alleging invasion of privacy. **Reason:** He never expected to be filmed at the job. But a District Court in Texas ruled that he did not have a reasonable expectation of privacy in an open cubicle.

◆ **One for the Ages**—Be careful what you say about older workers and how you say it. **New case:** An Ohio manufacturer fired a 55-year-old as part of a reduction in force. But a plant manager had remarked during union negotiations that older workers were driving up health care costs. The ex-employee was allowed to reference the manager’s statement to convince a jury that his firing was motivated by age discrimination.