

WORKPLACE

# Computer-use ruling seen as game changer

If employer provides tech devices and allows use on own time, then employees have a right to expect privacy, Ontario court declares

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Your BlackBerry has a file of photos of you getting frisky on your last vacation. You're running your hockey pool and doing your tax returns on the laptop you use for work.

Chances are there are personal files and e-mails and images on your work computer or smart phone that you'd rather not have your boss see.

And in what is being called a landmark decision, a Ontario court this week ruled that employees have a right to privacy for material contained on a work computer.

The judgment from the Ontario Court of Appeal involved a police search of an employer-issued computer used by a Sudbury high-school teacher that was found to contain pornographic images. The appeals judge agreed with a trial judge that by giving tech devices to employees, along with permission to take them home on evenings and vacations, the employer gave "explicit permission to use the laptops for personal use."

The ruling has significant implications for workers who use electronic devices including cell phones for personal purposes - "which is pretty well everyone" - as well as employers who might like to keep tabs on employee use of tech devices, said Frank Addario, of Sack, Goldblatt, Mitchell LLP, who argued the appeal for defendant Richard Cole.

"A big issue here is the tradeoff that employers expect employees to make," Mr. Addario said. "If they want their employees to be available 24/7 and are giving them BlackBerrys and PCs to contact them outside of business hours, it is inevitable that people are going to use those devices on their personal time as well as business time. That's an inevitable consequence of asking people to be on call beyond eight hours a day," he said.

"That means artifacts of personal, private life are going to

get left on the electronic devices, regardless of who paid for them," Mr. Addario said. And the court is saying that employers are going to have to respect that these are the employee's private property, he said.

How this plays out in workplace practice remains to be seen, said Ethan Poskanzer, a workplace lawyer with Sack, Goldblatt, Mitchell.

"Employers are going to have to tread more carefully in monitoring devices whether or not they own them," she said.

While there are no current numbers on how many companies in Canada conduct regular surveillance of their employees' computers, more than 40 per cent of U.S. employers regularly scrutinized their workers' files, according to a survey done by The ePolicy Institute, a Columbus, Ohio-based consulting firm, in 2007. And 28 per cent had fired an employee for misuse of e-mails or leaking classified information.

"I would call the court of appeal finding a seismic shift in the way privacy rights are dealt with in the workplace," said Daniel Lublin, a lawyer with Whitten & Lublin LLP in Toronto.

"Until now most people generally assumed there was no reasonable expectation of privacy in work computers, and that would extend to work e-mail and Internet use," he noted. "The court

has now resoundingly said that there is a reasonable expectation of privacy in work technology that leaves the office."

But there are some cautions, Mr. Lublin said: "The court makes a distinction that [the teacher] had privacy rights because the employer gave him the laptop and he was able to treat it as his own and take it home."

So this case is important for people and companies where people work from home and for people who use portable devices, including PDAs and tablets, said Mr. Lublin, who advises compan-

ies on computer-use policies.

"But I would suggest there is still a distinction between those and equipment such as desktop computers that never leave the office. That distinction is not addressed in this decision," he said.

Nor does the Ontario decision create carte blanche for employees to do things such as load and trade pornography on their computers, or for employers to let them do it, Mr. Lublin added. "What the court talks about is a reasonable expectation of privacy, but that is different from issues of discipline."

Employers still have an interest in what employees are doing while away from work. "The general rule is, if it is something that is contrary to human rights legislation - such as bullying or harassing other employees, exposing trade secrets or injuring the company or the company's reputation - it doesn't matter if someone is off-duty while doing it," Mr. Lublin explained.

The best thing for an employer is to have a clear, written policy. "There's nothing new about this, but many companies have a technology policy that they pulled off the Internet 10 years ago and haven't updated it, despite the recent proliferation of mobile technology," Mr. Lublin said.

Employers should make sure their employment contract or policy manuals make reference



to an ability to monitor e-mail and Internet use. They should also have clear policies and procedures laying out that they have the right to conduct random audits of company equipment, and that they will investigate allegations of misconduct in a neutral and impartial way.

As a result of the Ontario court ruling, "I suspect a lot of human resources people will be saying in the next few weeks: 'Let's look at our policies and tighten up definitions of what are inappropriate uses of devices, like doing things that are illegal or are leaking sensitive information,'" said **Claude Balthazard**, director of HR excellence for the **Human Resources Professionals Association** in Toronto.

He said he is not aware of any company in Canada that has a policy totally prohibiting storing of personal information on a

computer or a policy of conducting random checks on hard drives.

"Most employers have kind of made their peace with use of some company time on computers and phones personal reasons - as long as there is a limit. A lot of them are concerned about backlash; what does it say about them if they start monitoring them too much," Mr. Balthazard

said.

"It's so hard to keep up as new devices proliferate and BlackBerries and tablets become perks of the job," he added. "Employers tend to say, 'I am going to give you a BlackBerry and as long as you used it appropriately it will be all right to use it for personal uses as well.'"

However, it is always better to be safe than sorry, cautions Nancy Flynn, executive director of The ePolicy Institute.

"If your company provides you with a laptop or BlackBerry, you should bear in mind that the company is basically protecting you by warning you to limit your personal use of equipment," she said.

"If there ever should be a lawsuit or investigation, there is a possibility that your device will become part of the evidence pool and you'll have judges and forensic experts reading your e-mail messages and files. That can lead to embarrassment and personal family information being exposed."

#### WHAT EMPLOYERS DO

**43**

Percentage of U.S. employers who regularly review employee computer files.

**54**

Percentage that ban viewing, downloading, or uploading videos to sharing sites during working hours.

**46**

Percentage that restrict use of personal social networking sites during working hours.

**62**

Percentage that have a policy on personal use of company provided cellphones.

**33**

Percentage that set limits on use of personal text-messaging tools during business hours.

**73**

Percentage that use technology tools to automatically monitor e-mail.

Source: Surveys of U.S. employers by ePolicy Institute.

