

EXPECTATIONS OF PRIVACY

Context is king in determining whether there is an expectation of privacy for laptops supplied by employers.

Employers are normally advised to write and implement policies that ensure employees are aware that their computers, files and emails are subject to inspection. This is a well-understood matter of due diligence to protect the sensitive information that employees may have access to, including non-employee personal information that may be collected, used, or disclosed by the employer. Protecting this personally identifiable information is the purpose of organizational privacy programs.

Many employers spend a great deal of time and resources to ensure safeguards are in place to protect their employees' privacy. After all, protecting employee privacy is a best practice and represents the organization's commitment to value its employees. However, it can be difficult to determine how to balance requirements to monitor employees' electronic activities for security purposes while respecting employee privacy.

A recent decision by the Ontario Court of Appeal has shed some light on this issue and raised some questions about what the expectation of privacy might mean. You might find the answers surprising.

Facts of the case

In the normal course of his duties, a computer technician at an Ontario school board found sexually explicit photos of an under-aged female on a teacher's laptop that had been provided to a teacher by the school board for work-related purposes. Suspecting the photos were of a student, the technician copied them to a disc and showed them to the school's principal, who confiscated the laptop from the teacher the next day.

The police were called in and given the laptop, disks containing the copies of the photos, and the school board's appropriate-use and related policies. The board allows employees to take laptops home and to make "reasonable" personal use of them; however, it advised employees that they had no expectation of privacy in their emails. The police searched the laptop without obtaining a warrant, assuming it was allowed because it was the board's computer.

At trial, the judge excluded all of the evidence taken from the laptop, stating that the teacher had a reasonable expectation of privacy in the contents of the laptop and the police required a warrant to conduct a search. The decision was overturned by the Superior Court of Justice. The Court of Appeal was then called upon to decide this issue.

Court of Appeal decision

The Court of Appeal of Ontario (*R. v. Cole*, 2011 ONCA 218) determined that the teacher did, in fact, have a reasonable expectation of privacy. However, the teacher had no basis for an expectation of privacy from technicians working on a school board laptop, and the technician was carrying out his duties when he found the photos. Similarly, the principal acted in accordance with his duties under the *Education Act* in ordering the laptop confiscated. Therefore, the discs containing copies of the photos that the technician had discovered are allowable as evidence. The police, on the other hand, should not have seized the laptop without a warrant. As a result, the other files that they obtained from the laptop are excluded from evidence.

The matter has been referred back to the court for trial as of the writing of this column.

What can employers learn from this decision?

This case is primarily a Charter of Rights case, but is nonetheless interesting for HR and Payroll departments. What can employers do to avoid a similar collision of expectations and rights?

- If an employer expects employees to take an employer-provided laptop home and allows them "reasonable" personal use of that laptop, it could be inferred that the employee has privacy rights over that laptop and their information stored therein—even where there are contrary policies in place.
- An employer's policy on acceptable use and its right to inspect employee laptops needs to be carefully crafted. It should clearly establish employees' ex-

pectation of privacy with regard to the information on the laptop and state the reasons for which the employer may access it.

- Employers should review their operations to minimize the number of employees who have laptops and are expected to take them home. For example, if 80 per cent of employees leave their laptops in the office most of the time, there is a good argument to provide these employees with desktop computers and have some utility laptops that employees can borrow for off-site or at-home work. This may avoid the sense of personal ownership of the laptop, and it will have cost and security advantages, as desktop computers are less expensive and easier to keep secure.
- In addition, it seems likely that the privacy decisions concerning employer-provided laptops would also apply to employer-provided cellphones and other mobile devices. Once an employee is given exclusive use of the device and it leaves the office with him or her, there may be some expectations of privacy. Organizations should look at the devices they provide with this decision in mind.

In short, employers must make reasonable attempts to balance potentially opposing rights. When employees have exclusive use of laptops, for example, it's likely they will use them for online banking, personal email, and other normal activities that should be protected from as many eyes as possible—including those of the employer. While most people (this author included) will argue that employees have a responsibility not to use their laptops for anything that would leave compromising information on the machine, it is inevitable that some will, so a prudent organization will address the related privacy issues in advance. ■

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