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New York to Require Employers to Inform Workers of Electronic Monitoring

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On November 9, 2021, New York Gov. Kathy Hochul signed into law a bill that will require employers in New York State who engage in any electronic monitoring of employees' telephone, email and internet access and usage to provide notice to employees about such monitoring. The law takes effect on May 7, 2022.

Affected employers

The law applies to any employer with a place of business in New York State that monitors employees' telephone, email and internet access and usage. There is no employer size threshold.

Notice requirements

The written notice must inform employees that all telephone or email transmissions or conversations, or any internet access or usage via any electronic device or system, may be subject to monitoring at all times and by any lawful means. Employers must provide written notice upon hire to new employees that is acknowledged by the employee. In addition, employers must conspicuously post the notice.

Exceptions and limitations

The law does not define what constitutes "electronic monitoring." For example, it is not clear whether an employer needs to give notice if it reviews employee emails after employment termination, requires sales employees to log phone calls or reviews system logs after prohibited content is flagged.

Instead, the law enumerates three acceptable practices that alone would not trigger the notice requirement. Specifically, electronic monitoring does not require notice when:

- It is designed to manage the nature or volume of incoming or outgoing electronic mail or telephone voicemail or internet usage.
- It is not targeted to monitor or intercept the activities of any individual employee.
- It is performed solely for the purpose of computer system maintenance and/or protection.

Notably, the law does not prevent employers from monitoring employees' telephone, email, and internet access and usage. Rather, employers retain the right to monitor all such activity, as long as employees are given proper notice.

Violations

Employers who violate the law will be subject to fines of up to $500 for the first offense, $1,000 for the second offense, and $3,000 for the third and each subsequent offense. Only the New York attorney general has authority to enforce this new law, and there is no private right of action.

Action items for employers

Once the law takes effect, New York employers who monitor employees' electronic telephone, email, and

internet access and usage should prepare to disseminate notices to new hires and conspicuously post the notice. Given the many valid uses of employer IT system and communication monitoring, we anticipate that most employers will issue the required notices notwithstanding if they currently monitor IT systems or communications.

We are closely tracking this new law and will publish further guidance when additional information becomes available. If you have any questions related to this law, please reach out to a member of the Cooley employment team.

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Key Contacts

Ann Bevitt **London**	**abevitt@cooley.com** **+44 (0) 20 7556 4264**
Wendy Brenner Palo Alto	brennerwj@cooley.com +1 650 843 5371
Leslie Cancel San Francisco	lcancel@cooley.com +1 415 693 2175
Helenanne Connolly Reston	hconnolly@cooley.com +1 703 456 8685
Joseph Lockinger New York	jlockinger@cooley.com +1 212 479 6736
Joshua Mates San Francisco	jmates@cooley.com +1 415 693 2084
Gerard O'Shea New York	goshea@cooley.com +1 212 479 6704

Miriam Petrillo Chicago	mpetrillo@cooley.com +1 312 881 6612
Ryan Vann Chicago	rhvann@cooley.com +1 312 881 6640
Summer Wynn San Diego	swynn@cooley.com +1 858 550 6030
Steven A. Zuckerman New York	szuckerman@cooley.com +1 212 479 6647

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