Intercepting Employee Emails is Dangerous

The Regulation of Interception of Communications and Provision of Communication-related Information Act, number 70 of 2002 (RICA) came into effect at the end of September 2005. This act places very tight restrictions on employers wishing to monitor telephonic, e-mail and other communications of employees at the workplace. This makes it very difficult for employers needing proactively to monitor and prevent misuse of email facilities or to investigate allegations or suspicion of email misconduct or other misconduct perpetrated electronically.

This heavy piece of legislation is not only restrictive it is also, in certain places, written in unclear terms. For example, section 6 appears to allow monitoring of employee communications if these communications have been made in the course of the carrying on of the employer's business. However, there is no clarity as to what "in the course of the employer's business" means. Does it mean that the subject of the e-mail must be business related or does it merely mean that the e-mail must have been sent during business hours and/or via the employer's equipment/communication channels?

However, section 2 of RICA very clearly outlaws the interception of any communication in the course of its transmission. However, it is unclear as to what is meant by "in the course of its transmission". Does this imply that an employer can wait until after the message has been transmitted and can then read it? This seems unlikely as the provisions of RICA are based on the employee's constitutional right to privacy which would be made meaningless by this interpretation.

RICA appears to cover telephonic, e-mail and all other communications. The word intercept in section 2 of RICA means the "…acquisition of the contents" of the communication and includes acces via "listening to, viewing, examining or inspecting the communication.

The only section of RICA providing any hope for employers is section 5 that gives employers the right to

intercept employee communications if one of the parties to the communication gives written consent thereto. However, employers will not find it easy to get such consent from employees.

It seems, however, that once an e-mail is ‘made public’ by the sender it cannot be seen to be private and cannot fall under the scope of RICA. In the case of Van Wyk vs Independent Newspapers Gauteng (Pty) Ltd (Contemporary Labour Law November 2005 Vol 15 no. 4 page 37) the employee had been dismissed for sending two e-mails; one to his boss and one to several other people in the company. These e-mails had been found to be malicious and derogatory towards the newspaper’s editor. Both the CCMA and the Labour Court declined to see the e-mails as private as, in part, they had been sent to people who, because they were the intended recipients, had the right to read them and to act on them.

Thus the privacy protections of RICA appear to apply mainly to cases where neither the sender nor the recipient wishes the employer to access the content of the communication. It is in such cases that the employer’s rights to protect its interests are severely curtailed.

It is most understandable that our lawmakers, in the spirit of the constitutional right to privacy must protect people from being spied upon in the oppressive manner of South Africa’s old regime. However, what of the employer’s right to protect itself from employees who break it s rules and endanger its interests? For example, how is an employer to protect itself from employees who:

Send objectionable material to each other or to parties outside of the workplace?
Use up band with that is needed for business purposes?
Waste company time surfing the net or sending private e-mails?
Expose the employer’s computer’s to viruses?
Expose the employer to lawsuits by sending offending or unauthorised e-mails to employees or third parties?
Incur expenses for employers by sitting for hours on the telephone calls to their friends?

Employers need to be able to monitor employee usage of their communications systems in order to prevent the problems that arise from such misconduct.

In the light of RICA’s rigid provisions the best strategy that employers can use with any safety is to get written permission from all employees to monitor their e-mail or other communications. Employers should, in addition, draw up clear and comprehensive policies with regard to prohibiting the abuse of communication systems and the employer’s rights to protect their interests.

The obtaining of employees’ permission and the design of such policies should be done in consultation with a labour law expert in order to ensure that the employer neither infringes any legislation nor leaves any loopholes in its own system.

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