

WEIGHING THE PROS AND CONS OF MONITORING REMOTE WORKERS: 5 TIPS FOR EMPLOYERS

Insights
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Remote and hybrid work arrangements continue to reshape the way employers approach performance management, and many organizations are turning to technology to help supervise offsite workers. Whether an employer simply notes when remote workers are available online through a platform such as Teams or Slack or uses more sophisticated software to track keystrokes and other activity, monitoring remote employees has its pros and cons. Employers will need to understand the relevant legal risks and balance the value of such practices with the potential impact on employee morale. What points should employers consider as they review and revise their remote-work policies? Here are five tips from Fisher Phillips attorneys Risa Boerner and Brent Sedge, and SHRM's senior director of the HR Knowledge Center, Amber Clayton, SHRM-SCP.

1. Consider How Technology Can Help

"With the dramatic increase in remote-work arrangements since the inception of the pandemic—and the stickiness of those arrangements to this day—many employers are looking for ways to monitor productivity and ensure that employees are available and working during business hours," Boerner says.

How can technology help? Employers can use systems to track productive and unproductive time while employees work remotely, Clayton notes. For instance, a monitoring system could detect when an employee is performing tasks that aren't job-related, such as surfing the Web for

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restaurant recommendations or things to do on the weekend.

Monitoring can also be useful for timekeeping purposes, particularly with hourly employees. Accurate systems can help address potential wage and hour issues that may arise when nonexempt employees work offsite, Sedge explains. He notes the following additional benefits:

- **Increased accountability.** When employees are aware of the monitoring, they may be more mindful about how they spend time “at work” and less inclined to engage in conduct that violates an employer’s workplace policies. In this way, monitoring can help employees stay on task and manage distractions.
- **Process improvement.** Many monitoring solutions provide robust analytics beyond simply “looking over an employee’s shoulder.”
- **Helpful performance feedback.** The data captured by monitoring solutions can paint a comprehensive picture of a worker’s contributions.
- **Workload management.** When properly used, many monitoring solutions can assist managers in identifying when an employee is overworked and may be on the verge of burnout.

Monitoring solutions can also help employers protect sensitive business information and ensure it is not inadvertently lost or stolen or intentionally removed for competitive purposes.

2. Recognize that Compliance Is Complicated

Employers should be mindful of employee privacy rights, including those contained in specific monitoring laws as well as common law and even state constitutional rights to privacy in certain locations, Boerner notes.

She cautions that employers that monitor employees may unintentionally capture personal information, such as an employee’s membership in a protected class or participation in after-hours activities that may be protected by off-duty conduct laws. As a result, Boerner says, employers should consider limiting the scope of monitoring and providing notice of the practice, even when it’s not expressly required by statute.

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In addition, employers should pay attention to differences in state law. For instance, a Texas worker performing duties remotely from California could potentially expose an employer to liability under the California Privacy Rights Act. Because of concerns like this, employers may want to restrict employees from working outside of their respective states, if practical.

Sedge suggests taking a proactive and transparent approach to minimize the legal risks. "This can allow employers to enjoy the benefits of a flexible workforce while reducing their overall legal risk," he says.

3. Review the Patchwork of Laws

Employers should work with counsel to review the many federal, state and local laws that could come into play when monitoring employees, Boerner says. Consider the following examples:

- **Federal restrictions.** The Stored Communications Act could impact an employer's ability to access certain information, even when it's stored on an employer-issued device.
- **Wiretap laws.** Recording conversations may require two-party consent in some jurisdictions.
- **State privacy laws.** These laws vary, so employers should carefully review the requirements in their locations.
- **Notice requirements.** State laws are getting more specific. In New York, for example, employers must provide notices to employees about any electronic monitoring practices that are in use and must obtain employee acknowledgments.
- **GPS monitoring limitations.** Certain state laws limit employers' ability to track employee movement.

4. Focus on Morale

In addition to reducing legal risks, transparency may help put skeptical workers' minds at ease. Inevitably, some employees will resist being monitored and may even be less productive if they think they're being closely watched or micromanaged. In these cases, proactive communication could provide reassurance and help get workers back on track.

“Employers should communicate why they are using an electronic monitoring system, what it does and how it will be used,” Clayton says. She recommends that employers ensure employees understand that the system is not designed or intended to monitor what they do in their personal lives.

Sedge similarly suggests that employers should go beyond issuing a privacy policy that simply discloses the type of data being collected. While having and sharing such a policy is a great start, he says, an employer that is more transparent and explains the reason for the monitoring may face less resistance than an employer that takes a “because-we-said-so” approach.

5. Weigh the Alternatives

Because every workplace environment and culture is different, using technology to monitor productivity may work for some businesses but not for others. The good news is that employers can assess productivity, performance, and employee engagement in a variety of ways.

Many managers schedule regular check-ins with remote employees either on the phone or through a videoconference, Clayton explains. Some managers ask employees to document projects or tasks they are working on. Others use a timekeeping software system that requires workers to clock in and out, which might seem less invasive to an employee.

If the goal is to protect confidential data and trade secrets, Boerner says, employers can consider implementing security controls that limit employees’ ability to save, copy or print sensitive data. This can help protect the company’s confidential information without the need for monitoring.

Want to remove potential distractions? Implementing strong computer use policies and limiting access to certain websites that are not needed for business purposes can reduce the likelihood that employees might spend time visiting those sites rather than focusing on work, Boerner notes.

The key is to stay focused on performance metrics. Remote workers are much less likely to object to a monitoring suite that provides insights into performance through analytics than a requirement to be visible on a webcam during all work

hours, Sedge says. In principle, both address the same employer concern: ensuring a productive workforce.

Conclusion

We will continue to monitor developments in this area and provide updates as warranted, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. For further information, contact the authors of this Insight, your Fisher Phillips attorney, or any attorney in our [Privacy and Cyber Practice Group](#).

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