The Future of Employee Privacy

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Roadmap

1. Managing Employee Privacy in the U.S.

2. Emerging Issues with Managing Employee Privacy

3. New State and International Data Privacy and Security Obligations

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Traditional Employee Privacy: Public vs. Private

- Public employers: Individuals do not give up their rights under the Fourth Amendment to be free from unreasonable searches and seizures by going to work for the government
- Private employers: Right of privacy only exists to the extent granted by state law or agreement with employees

Traditional Employee Privacy: Invasion of Privacy Claims in Wisconsin

- Statutory claim for Invasion of Privacy applies in workplace: four types of claims. Wis. Stats. § 995.50.
  - Intrusion upon the privacy of another of a nature highly offensive to a reasonable person
  - The use, for advertising purposes, of the name, portrait or picture of any living person, without consent
  - Publicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person
  - Violating Wisconsin's law against taking nude pictures of another without consent

Using Employee Handbooks to Manage Employee Privacy Expectations

- More than general "no expectation of privacy"
- Technology policy: Whose device? Whose data?
- Use of company equipment/Internet, e-mail and social media policies
- Reserve right to modify
- Keep signed acknowledgement of receipt for changes made to handbook or policies

Using Handbooks and Contracts to Manage Employee Privacy Expectations

- Does employee handbook define:
  - An employee's responsibilities regarding data privacy and security (mobile devices, work devices, remote access)?
  - What happens (who owns) data when an employee leaves?
  - Levels of data authorization (or cross-reference an acceptable use policy)?
- Vendor contracts — you must inform us if you suspend/terminate an employee with access
- HR — first line of defense — investigate before terminating

Using Contracts and Litigation to Manage Employee Privacy Expectations

- Confidentiality agreements — under what circumstances?
- Return of company property agreements — data = property
- Do agreements allow you to search for and delete your data?
- Do agreements require employee to notify? Delete? Cooperate after quitting?
- Litigation: preserve and document
  - Most sensitive material taken within week of quitting
  - Document steps taken to retrieve data or uncover theft of data

Emerging Issues with Managing Employee Privacy

What counts as data?

- Individual data: State laws typically define personally identifiable information (PII) as an individual's first name or initial with last name and one or more of the following (unencrypted) data elements:
  - Social Security number
  - Driver's license number or state or military identification card number
  - Financial account, credit card, or debit card number in combination with any required security code, access code, or password that permits access to an individual's account
- Sensitive company data:
  - Trade secrets, customer lists, pricing information, vendor contract terms
  - Salary history, EEO information, human resources investigation files

Emerging Issues with Managing Employee Privacy (cont.)

Reasonable Security Measures

- Nineteen states now require employers (of residents of their states) to implement "reasonable security measures" with regard to their maintenance or destruction of employee data
- Some states define "reasonable security measures" while others do not
- Some states require written policies specifying practices
- Requirements when data breached: enhanced notification requirements, fines. Less frequent: private right of action.

Emerging Issues with Managing Employee Privacy (cont.)

Reasonable Security Measures

- Wisconsin
  - Has not adopted reasonable security measures requirement
  - Employers must abide my data breach notification requirements. Wis. Stats. § 134.98.
- Illinois
  - Has adopted reasonable security measures requirement
  - Biometric information privacy act requires reasonable care and protection of biometric information. 740 ILCS 14.

Emerging Issues with Managing Employee Privacy (cont.)

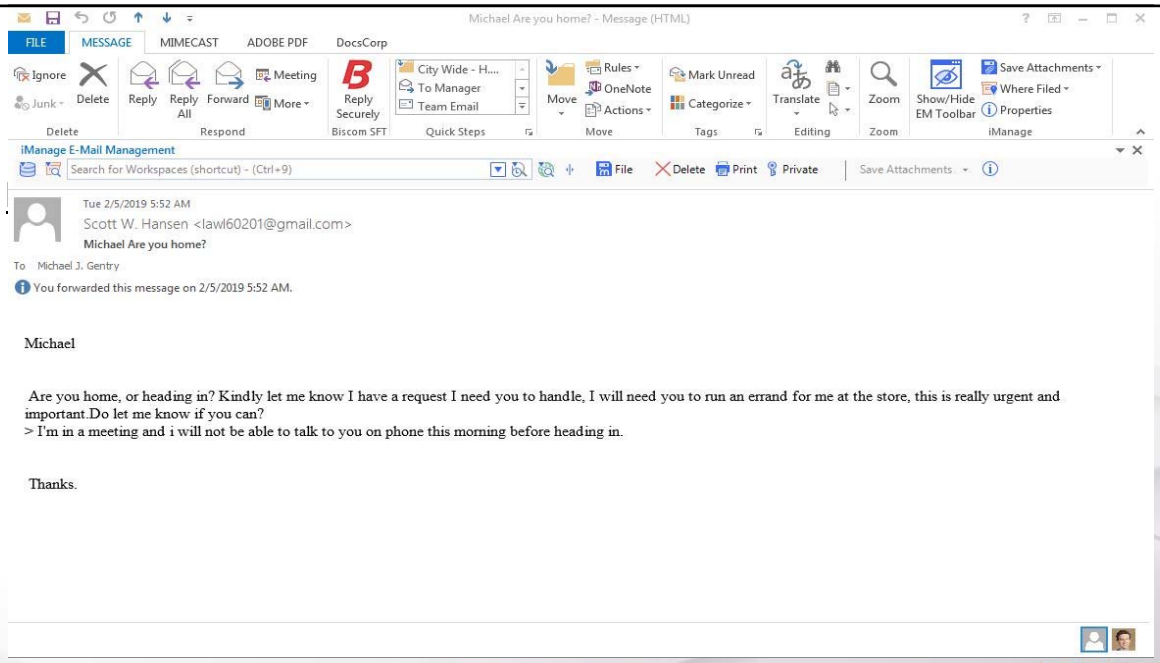
Recent Litigation Update

- Illinois' biometric information privacy law
  - Key update: Employees need not show particular harm to bring a claim under the biometric privacy law
  - *Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186, ¶ 1, 2019 WL 323902, at *1.
- Wisconsin social media privacy law. Wis. Stats. 995.55.
  - DWD only recently received first complaint under this law
  - Employers may require access to employer devices, or require observance of data transfer

Emerging Issues with Managing Employee Privacy (cont.)

Preventing Employees From Becoming Insider Threats

- How are insiders a threat?
  - Phishing — not necessarily new tactic but still effective
  - Email addresses — public; identical; easy to guess (name@company.com)
  - Fake Gmail accounts of coworkers/team members
- Disgruntled employees
  - Employees have access to sensitive data until the access is turned off
  - Employees know they are leaving before you do



New International Obligations: Who Does the GDPR Apply to?

Established in the EU	Offering Goods or Services to people in the EU	Monitoring of data subjects in the EU
• HR company located in Germany • Data hosting service provider located in Ireland • Company with a distribution center in Italy	• U.S. online retail store sells and ships to customers in the EU with a website that offers payment in euros	• U.S. company with a website that places cookies on and tracks the IP addresses of EU-based website visitors • U.S.-based company that traces e-mails to customers in the EU

New International Obligations: GDPR Requirements

- Data subject rights
  - Right of access
  - Right of rectification
  - Right of erasure
  - Right of data portability
  - Right of restricted processing
  - Right to lodge a complaint
- Lawful basis
  - Contract with data subject
  - Consent
  - Necessary to comply with a legal obligation
  - Necessary to protect the vital interest of the data subject or another person
  - Public interest
  - Legitimate interest of processing

New State Law Obligations: California Consumer Privacy Act

- Effective January 1, 2020
- Protects California residents' "personal information" — broad definition
- Applies to any company that receives California resident personal information, and meets one of the following criteria:
  - Annual gross revenues of $25 million
  - Obtains "personal information" on 50,000 residents
  - Receives at least 50% of annual revenue from selling California resident "personal information"

New State Law Obligations: California Consumer Privacy Act (cont.)

- If CCPA applies:
  - Consumer/employee right to request disclosure of what personal information is collected and why
  - Consumer/employee right to request deletion of personal information (with exceptions)
  - Consumer/employee right of access and portability of their data
  - Consumer/employee right to be forgotten
  - Enforced by the Attorney General of California and provides for a private right of action

Questions?

Thank You!

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