

# Risk Monitor



## Are You Legally Monitoring Your Employees' Electronic Communications?

Employees' right to privacy when using electronic communications has become a major workplace issue within the last decade. What constitutes an invasion of privacy? When does an employer have the right to monitor electronic communications? And does monitoring bring up the Orwellian image of Big Brother?

The Electronic Communications Privacy Act (ECPA) of 1986 is the only federal statute that deals directly with the interception of e-mail. The ECPA was enacted to extend an earlier legislation's protection against the unauthorized access of wire and oral communications to include electronic communications. Although the Act doesn't expressly mention e-mails, courts have interpreted the term "electronic communications" to include emails.

The ECPA does not, however, guarantee an employee's right to email privacy in the workplace. There are three specific instances when an employee's protection under the ECPA does not apply:

- **The Consent Exception** - Section 2511(2)(d) indicates that an interception of an electronic communication is considered legal if the person doing the intercepting is a party to the communication, or if one of the parties involved in the communication consents. The only exception to this proviso is if the purpose of intercepting the communication is to use it to commit a crime or tort. If an employer asks their employees to sign an employment agreement stating that their electronic communications will be monitored, the agreement will nullify the protection of the ECPA.
- **The Provider Exception** – Section 2511(2)(a)(i) allows an officer, employee, or agent of a provider of wire or

electronic communication service, whose equipment is used in the transmission of an electronic communication, to intercept, disclose, or use that communication in the normal course of employment if that person is involved in an activity which impacts upon the normal course of operations or upon the protection of their property rights. This means that intercepting emails to conduct quality checks is permissible as is intercepting them if you believe an employee is "stealing" the service by sending emails to friends on company time.

- **The Business Extension Exception** – Section 2510(5)(a) exception also covers interception done in the ordinary course of business. It is similar in intent to the provider exception.

What all of these exceptions boil down to is that employers are justified in intercepting email messages as long as they have a valid business reason for doing so. However, if the business takes physical action to protect the privacy of email by installing a system that allows messages to be marked as confidential or by using passwords; or if the business tells employees that their email is private, the employer's right to intercept may be considered voided unless one of the above stated exceptions can be proven.

Although there are still accusations that intercepting email is an outright invasion of a worker's privacy even though the message may be written on company time and using company equipment, intercepting emails is becoming increasingly necessary. As the number of employees who sue because of harassment that occurred via email increases, businesses will find that limiting risk will depend upon knowing when you can legally intercept.

### Welcome to the Winter 2005 Corcoran & Havlin Insurance Group Risk Monitor Newsletter.

In this issue we have focused on employee related issues ranging from monitoring electronic communications to safety & return to work programs. We also have an article explaining how coinsurance works in Builders Risk & property policies. We hope that you find this information interesting and informative. As always, do not hesitate to contact us if you have questions or if we can be of any assistance.



The Corcoran Havlin Sales Team; from left Jack Keefe, President; George Doherty, Executive VP; Mark Sawyer, Vice President; Rick Weden, Vice President; Ronald Long, Account Executive.

**Corcoran & Havlin Insurance Group**  
287 Linden Street  
Wellesley, MA 02482

Phone: (781) 235-3100  
Fax: (781) 235-7190  
Website: <http://www.chinsurance.com>  
Email: [rlong@chinsurance.com](mailto:rlong@chinsurance.com)



# Start a Safety Committee to Increase the Effectiveness of Your Safety Program

If employees don't feel involved and represented in their company's safety program, it is unlikely the program will be successful. A workplace safety committee is a tool that, if created and conducted properly, can increase the effectiveness of a safety program by:

- Providing structure and assigning responsibility for carrying out a workplace safety program;
- Enhancing a cooperative attitude and bringing together strong interaction among various areas of an organization;
- Serving as a communication vehicle for employees to voice safety concerns;
- Serving as a tool for employers to promote safety to employees; and
- Spreading the responsibility of the safety program among employees.

A safety committee will only be successful, however, if it is carefully created with structure and support. As with any safety initiative, it is imperative that management be visibly and actively involved. Members should serve on the committee and attend regular meetings. Other committee members should be chosen for their enthusiasm, potential expertise and communication skills. The committee should include representatives from all the various departments but not become so large that it becomes cumbersome and ineffective.

To ensure that the committee doesn't become a place for employees just to voice complaints, the committee's goals should be clear from the start. Its primary role is always to promote and ensure the success of a company's safety program.

The specific responsibilities of the safety committee may include:

- Develop strategic safety goals and annual action items;
- Participate in development, monitoring and updating of safety program and possible safety incentives;
- Hold monthly safety meetings;
- Hold regular workplace safety inspections and help identify workplace hazards;
- Participate in accident/incident investigations;
- Ensure maintenance of injury and work hazard records;
- Perform review of illness and injury records;
- Organize regular safety training programs;
- Consult with outside experts when necessary;

- Address employee complaints and suggestions regarding safety issues;
- Make safety recommendations to management; and
- Communicate with employees and management about safety issues and goals.

Every group needs a leader and a safety committee is no exception. A workplace safety coordinator should be assigned to head the group. For many companies this will not be a separate position but rather an added role to an individual's



existing position. The coordinator is responsible for leading the committee, scheduling and heading safety meetings, serving as a point-of-contact with outside agencies and retaining safety records and documents. Safety meetings should be well documented and the records should be retained for at least a couple years. Many safety committees prepare an annual report to overview the safety trends within the organization, advertise their results, and identify outstanding safety issues.

For companies beginning a new safety committee, the following first meeting agenda is a good starting point:


- Establish the role and purpose of the committee;
- Discuss the commitment required from each member;
- Develop an agenda for what the committee hopes to achieve, both long and short term;
- Assign action items to the members of the committee; and
- Take meeting notes and post the minutes as well as committee goals and action items.

# Helping Employees Make Their Comeback After a Work-Related Injury or Illness

workers' compensation is critical to not losing that employee to a competitor and to facilitate a rapid and smooth transition back into the workplace." She recommends the following steps for maintain a strong connection and facilitating a smooth re-entry:

- Clarify expectations with the employee early on as to what they can and want to do. If job reassignment will be necessary upon their return, let them know that you are willing to explore possible options. Get a feel for the kinds of jobs they might be interested in and realistically explore how and where they can fit in.
- Assign a communication buddy to the individual who can commit to having a regular weekly update conversation with the absent employee. Make sure that the employee has a means to receive critical information while absent from the organization.
- Include the absent employee via phone teleconferencing in key events that will affect them directly. This is critical when it comes to changes in company/departmental policies or revisions in work floor procedures. You don't want an employee to return to work only to be reprimanded the first day back for violating a policy change that they were unaware of. It increases the feeling that they have been left behind. Those negative feelings might continue to grow until the employee feels compelled to find another job.
- Encourage the work group to stay connected and communicate to the disabled employee that they care about their recovery. It's like Hallmark always says, "When you care enough to send the very best." Make sure an absent employee knows that they are truly missed by their co-workers. And most importantly, make sure the employee knows that their bosses are among those people!

The lesson to be learned from all of this is simple. Transitioning back into the workplace begins as soon as the employee starts their leave. If you plan for their re-entry from the outset, it will be as seamless as it should be.



The fallout from an extended injury or illness can devastate employees and their families financially, physically and mentally. Trying to live on decreased income from a workers' compensation claim, coupled with family members having to take on additional responsibilities the disabled person cannot perform, can put a real strain on relationships. As time passes, the additional problem of becoming increasingly isolated from their former life raises tension levels in an already highly charged situation.

This scenario occurs more often than you might think. According to the U.S. Bureau of Labor Statistics, in 2002, a total of 1.4 million injuries and illnesses in private industry required recuperation away from work beyond the day of the incident. What's even more surprising about the Bureau's findings is that injuries and illnesses to workers aged 20 to 44 accounted for 64 percent of all injured workers. Workers aged 65 and over accounted for only 1.7 percent of total injuries and illnesses. The fact that the majority of workers on extended leave are workers who will need to return to work clarifies how important setting the stage for their comeback really is.

Leslie Yerkes, an organizational behaviorist and president of Cleveland, Ohio-based Catalyst Consulting Group, Inc. notes, "Finding and keeping good people provides a competitive advantage for organizations. So, keeping the bond strong when employees are on family leave, working virtually or out on

## continued from page 4...Interpreting the Coinsurance Clause in a Builder's Risk Policy

there are cost overruns the increased completed value must be reflected in the policy limit. Therefore, it is critical to keep your insurance agent informed so that your policy limits can be updated appropriately.

Another mistake is using the amount of the construction loan as the limit of insurance. The completed value of a project is almost always more than the construction loan. Here's an example: A developer funded a significant portion of a building project with cash, but did not include this amount when computing the completed value, and obtained insurance only for the financed amount. The policyholder learned a tough lesson when the insurer applied a 50% coinsurance penalty to a \$5.9 million loss.

Sometimes policyholders fail to include overhead and profit, usually figured at 10 percent each, in the completed value of a project. Since these items represent up to 20 percent of completed value, leaving them out could lead to a large coinsurance penalty.

On the other hand, some items should be excluded from the calculation of completed value. The largest of these is land value. Other items, such as excavations and underground work, should also be excluded. If you include them in your calculation of completed value, you incur extra cost with no benefit in the event of a loss since these items are excluded from most policy forms.

# Interpreting the Coinsurance Clause in a Builder's Risk Policy

As the name implies, the coinsurance clause—which is typically found in a builder's risk completed value policy—makes the policyholder a co-insurer of risk. Under certain conditions, when there is a coinsurance clause, the insurance company will not pay the full amount of a loss; part will be borne by the policyholder.



The advantage of buying insurance with a coinsurance clause is the policy's premium will generally be lower than a similar policy without the coinsurance clause. To avoid an unpleasant surprise in the event of a loss, it's important to understand what the coinsurance clause requires. Typically, the clause in a builder's risk

completed value policy reads as follows:

“Need for Adequate Insurance. We will not pay a greater share of any loss than the proportion that the Limit of Insurance bears to the value on the date of completion of the building described in the Declarations.”

Policyholders are often confused by the relationship between the policy limit and the coinsurance clause. When a policy has a limit of \$100,000 and the amount of a loss is \$20,000, well below the policy limit, it would seem as though the insurer must pay the full amount of the loss. Due to the coinsurance clause, however, the insurer may or may not pay the full amount of the loss, depending on whether the insured has maintained the amount of insurance necessary to avoid the coinsurance penalty.

Here's an example of how the coinsurance clause would be applied: You have a policy with a \$100,000 policy limit. A windstorm does \$20,000 worth of damage. At the time of the loss, it is determined that the completed value of the project will be \$120,000. The policy value of \$100,000 is 80% of \$120,000 (the actual value of the project). Therefore, the insurer will pay only 80 percent of the \$20,000 loss, or \$16,000.

Whenever the insured receives less than the full value of the claim due to the discrepancy between the policy limit and the completed value of the project, the insured is said to have experienced “a coinsurance penalty.”

One common mistake by policyholders, which often leads to a coinsurance penalty, is not reporting cost overruns. When

*continued on page 3*



**CORCORAN & HAVLIN  
INSURANCE GROUP**

287 Linden Street  
Wellesley, MA 02482

## Risk Monitor