

Employee BlackBerry Use

What Is Private, and What Is Employer-accessible?

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A BlackBerry is a handheld device that makes it easy for people to stay connected to each other regardless of where they are. It is so convenient that it becomes part of one's daily routine, blurring the line between business and personal device in the mind of the user. However, this begs the question as to whether an employee has an expectation of privacy when using their BlackBerry.

As is usually the case with technological advances and employment law, the question is much simpler than the answer.

The evolution of technology and the growth of business appear to go hand-in-hand. Tools of the trade 20 years ago included a day planner, desktop computer, fax machine, and telephone. There was a clear division between tools a company purchased for its employees and those professionals purchased personally.

Today, many people use E-mail, laptops, and BlackBerries or other small, handheld devices to communicate and conduct business. The BlackBerry is a unique device because it combines the capabilities of a telephone with many of the features of a computer. Individuals can use it as a phone and also to check their E-mail, schedule appointments, and to find information on the Internet. Each BlackBerry requires a mobile data plan to provide the service required to use the device.

So, should your employer have access to the information you send and receive when using your BlackBerry?

In order to analyze the issue, it is important to understand how the BlackBerry device works. If used for business purposes, it will

be tied into your E-mail, contacts, and calendar. This is accomplished by using a BlackBerry server that is tied into your company's computer server. The BlackBerry server facilitates synchronization between your BlackBerry and your employer's system that governs E-mail, cal-

Internet so that both are only used for business reasons.

The above example is the easiest to answer because all of the information and ownership rests with the employer. However, a more complicated situation arises when you purchase the BlackBerry device and your

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endar, and contacts. In other words, your BlackBerry can synchronize with Microsoft Outlook, which is an E-mail, calendar, scheduler, and contacts program.

While you use a BlackBerry, it continually refreshes and synchronizes with your E-mail account, calendar, and contacts. Typically, your employer will provide you with the BlackBerry and pay for the service that connects the device to your employer's E-mail system or Microsoft Outlook. In this case, you should have no expectation to privacy, as the information stored on the BlackBerry is contemporaneously stored on your company's server. In fact, you should have the same expectation of privacy that you have with anything on a desktop computer that is furnished by your employer. In addition, the use of the device may be governed by your employer's Internet and E-mail use policy. Generally, these policies restrict the use of company E-mail and

employer agrees to pay for the data service (to be distinguished from the phone service). Here, you use the BlackBerry device for work, and it is tied directly to your employer's server. Like the first example, you should have no expectation to privacy when the device is tied into your employer's E-mail system. However, the example becomes more complicated when you also use the device for your personal phone and pay for the phone service.

On the one hand, there is no expectation to privacy relating to all of the E-mail, contacts, and calendar information that is stored on your employer's server and mirrored on the BlackBerry. On the other hand, you may have an expectation to privacy relating to your phone use and text messages. Text messages are to be distinguished from E-mail because they are not transmitted in the same fashion. Typically, text messages are sent from phone num-

ber to phone number, as opposed to an E-mail that is sent from one E-mail address to another. Your employer will have no record of your text messages because they are not stored on your employer's server like your company E-mail. Since text messages are not locally stored, the issue of whether your employer may have access to those messages is controlled by various case law and the Stored Communications Act (SCA).

In 1986, Congress passed the Stored Communications Act as part of the Electronic Communications Privacy Act. The Stored Communications Act was enacted because the advent of the Internet presented a host of potential privacy breaches that the Fourth Amendment does not address. Generally, the SCA prevents 'providers' of communication services from divulging private communications to certain entities and/or individuals. In one case, a federal court held that employers may not read their employees' text messages without the employees' consent. In that case, an employer attempted to audit the text transmissions of an employee by requesting a transcript of the employee's text messages from the wireless provider. The employer did not have a formal policy regarding monitoring text message use.

Another situation to consider is when the employer neither pays for your device nor pays for the service. In this example, you are still tied into your employer's server for purposes of receiving E-mail, scheduling, and contact information. As stated above, you would have the same expectation to privacy as if you were sitting at your desk in the office. However, the fact that you are paying for the service and the device would

support an argument that you have an expectation to privacy relating to phone and text use.

Finally, there are also issues relating to receiving personal E-mail. In all of the examples given above, the question regarding whether your employer has access to personal email will pivot on several factors:

- whether your employer has an E-mail or Internet use policy that restricts access to E-mail and the Internet for personal use;
- whether you sent or received E-mail that is personal in nature through the company's E-mail system; and
- whether you used the Internet and a Web-based E-mail program to send and receive personal E-mail.

While these factors lead to other issues, the analysis will depend upon fact specifics and be

viewed on a case-by-case basis. However, it is clear that, if you are tied into your employer's computer system, you may have no expectation to privacy.

Tools of the trade 20 years ago included a day planner, desktop computer, fax machine, and telephone. There was a clear division between tools a company purchased for its employees and those professionals purchased personally.

In order for you to enjoy an expectation of privacy, you should not be connected to your employer's server, or you should take steps to eliminate any potential exposure such as creating a personal E-mail account.

Consider your handheld device like a business desktop computer with an E-mail account furnished by your employer. You have no expectation of privacy, especially

if your employer has a policy that strictly prohibits personal use of the account and advises employees that the account is for business purposes only.

It is strongly advisable for employers to establish a policy

regarding BlackBerry use when they provide the device to their employees, and to check with counsel to determine whether their policy violates the employees' right to privacy. It is also advisable that you check with human resources regarding its use and review your company's Internet and E-mail use policy.❖

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