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# The Electronic Workplace

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## THE ELECTRONIC WORKPLACE

BY

ANN C. HODGES\* AND L. CAMILLE HÉBERT\*\*

The American workplace of the twenty-first century is in the midst of a vast transformation not unlike the Industrial Revolution of the late nineteenth century. The United States has moved from a manufacturing-based economy to a knowledge-based economy. This new era has been variously denominated the Technological Revolution, the Electronic Revolution, or the Digital Revolution. Thomas Friedman has described the transformative change as a flattening of the world.<sup>1</sup> Historians will almost certainly have a name for this monumental change in the economy, which, of course, is affecting not only the United States but many other countries in the world as well. As for the new workplace, Professor Katherine Stone has described it as “boundaryless.”<sup>2</sup>

One of the hallmarks of this new workplace is the increasing use of electronic technology, the focus of the current symposium issue on the electronic workplace. The implications of this change are widespread and the articles included in this symposium reflect some of the areas in which the electronic revolution is affecting the workplace. While the changes have begun, they are not yet complete and we will continue to see dramatic impacts on the workplace in future years. This introduction will highlight some of the current effects on the workplace and put the articles in the symposium in the context of those changes.

Among the implications of the technological changes is an increase in the importance of human capital to business.<sup>3</sup> As a result

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1. THOMAS L. FRIEDMAN, *THE WORLD IS FLAT* (2006).
2. Katherine V. W. Stone, *Employee Representation in the Boundaryless Workplace*, 77 *CHI.-KENT. L. REV.* 773 (2002).
3. KATHERINE V. W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* 127 (2004).

of this change, employers are utilizing covenants not to compete more commonly and for more employees, attempting to stem the loss of human capital, while at the same time eliminating the traditional employment relationship in which many employees expected to, and did, spend their entire careers with one employer.<sup>4</sup> Employees are more mobile, in part because of the changes by employers, who no longer structure their human resources practices to encourage long-term employment.<sup>5</sup> Employee mobility is also encouraged because employees are advised to control their own careers, to build their knowledge and skills, and to make themselves ever more marketable in the continually changing economy.<sup>6</sup> Even in the absence of employee mobility, important employer data is moving as employees increasingly work outside the traditional fixed workplace setting and, in many cases, use their own equipment to maintain and transport data.<sup>7</sup> The risk to employers of data loss, even in the absence of intentional misconduct, is apparent.

The increasing employee mobility and the changing economy have resulted in an increase not only in the use of noncompetition agreements, but also in litigation over ownership and use of human capital and knowledge. Litigation over trade secrets, confidentiality agreements, and the employee duty of loyalty has increased exponentially.<sup>8</sup> The agreements and corresponding litigation or threats of litigation not only involve high-level executives and sales personnel, but employees at lower levels in the enterprise, who, in the old economy, had little information worth protecting and were unlikely to be poached by other employers in any event. As the world has flattened, the workplace has also flattened, pushing knowledge and skills into ever lower levels of the workplace. This has raised questions about the impact of mobility restrictions on innovation. Professor Gilson has suggested that California law, which severely restricts enforcement of noncompetition agreements, is partially

4. Katherine V. W. Stone, *Knowledge at Work: Disputes over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721 (2002). Since the early part of the twentieth century, employers have also used the law to prevent employees from obtaining ownership of patents, another method for employer control of employees' human capital. See Catherine Fisk, *Removing the "Fuel of Interest" from the "Fire of Genius": Law and the Employee-Inventor, 1830-1930*, 65 U. CHI. L. REV. 1127 (1998).

5. See Stone, *supra* note 4, at 729-32.

6. PETER CAPPELLI, *THE NEW DEAL AT WORK* 14, 28-29 (1999).

7. Bradford K. Newman, *Protecting Trade Secrets: Dealing with the Brave New World of Employee Mobility*, BUS. L. TODAY, Nov.-Dec. 2007, at 25, 26.

8. See STONE, *supra* note 3, at 130-31.

responsible for the success of Silicon Valley in generating innovation.<sup>9</sup> At the same time, however, both courts and legislatures have been more willing to restrict employee mobility at the behest of employers.<sup>10</sup>

Despite this increased receptiveness to enforcement of restrictive covenants, the rapid advance and changes in technology have created issues about the enforceability of covenants based on the traditional grounds of reasonableness. As knowledge becomes obsolete more quickly, can lengthy restrictions on worker mobility be sustained as reasonable?<sup>11</sup> Can worldwide geographic restrictions on competition be reasonable when employers have a presence on the internet, suggesting that they compete in a world market? Courts, employers, and employees are struggling with these questions.

Richard Warner's article alerts us to a new tool in the employer's box for responding to employees who leave an employer for a competitor, taking with them computerized information.<sup>12</sup> The Computer Fraud and Abuse Act,<sup>13</sup> while originally prompted by the desire to penalize computer hackers with criminal sanctions, is now being used by some employers to impose civil penalties on former employees and their new employers who benefit from computerized confidential information accessed and supplied by the departing employee.<sup>14</sup> Warner's article educates about the application of the law in the employment context and alerts employers to the possible interaction of this federal law with new state laws that require businesses to alert customers or employees whose data is compromised.<sup>15</sup> This is a new frontier for employers and employees, but one that can provide liability for some and recovery of costs for others.

The boundaryless workplace, enabled by electronic technology, has created numerous issues regarding enforceability of laws created at a time when all employees reported to a building owned or leased

9. Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128 and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 578 (1994).

10. See STONE, *supra* note 3, at 131.

11. See Ann C. Hodges & Porcher L. Taylor, III, *The Business Fallout From the Rapid Obsolescence and Planned Obsolescence of High-Tech Products: Downsizing of Noncompetition Agreements*, 6 COLUM. SCI. & TECH. L. REV. 3 (2004).

12. Richard Warner, *The Employer's New Weapon: Employee Liability Under the Computer Fraud and Abuse Act*, 12 EMP. RTS. & EMP. POL'Y J. 11 (2008).

13. 18 U.S.C. § 1030 (2000).

14. Warner, *supra* note 12, at 13.

15. *Id.* at 17-24.

by the employer to perform their duties. The issue of home work is not a new one, of course. In the early years of the Fair Labor Standards Act, the Department of Labor banned home work in a number of industries due to the exploitation of home workers and the enforcement difficulties created.<sup>16</sup> The statute authorizes "such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate . . . ."<sup>17</sup> In the 1980s, the Department began to rescind the outright prohibitions on home work, moving to a system of regulation rather than prohibition.<sup>18</sup> Today's technology has spread home work from a small number of industries throughout the economy, and changes in workplace demographics, including the increase in working parents, have made home work not only attractive to employers and employees but in some cases essential to retaining qualified workers.

Enforcement issues remain, however. In 1999, the Occupational Safety and Health Administration (OSHA) took the position that employers could be held liable for unsafe working conditions in employees' homes, suggesting that businesses consider inspections of home offices.<sup>19</sup> Employer reaction was instantaneous, triggering widespread criticism and even a congressional hearing.<sup>20</sup> Within a few months, the pressure succeeded and OSHA expressly exempted home workplaces from inspection.<sup>21</sup> OSHA's retreat, however, does not resolve the question of how workplace regulation applies in the context of employees who may work at the employer's worksite, their home, their car, and even the local Starbucks, all within a single day.<sup>22</sup>

The electronic workplace has created opportunities for individuals with disabilities who may have mobility issues that limit their ability to commute to work.<sup>23</sup> Courts interpreting the Americans

16. See *ILGWU v. Dole*, 729 F. Supp. 877, 878-89 (D.D.C. 1989).

17. 29 U.S.C. § 211(d) (2000).

18. *ILGWU v. Dole*, 729 F. Supp. at 878-80.

19. See OSHA Standard Interpretation and Compliance Letters, *OSHA Policies Concerning Employees Working at Home*, 11/15/1999, available at <[http://www.osha.gov/as/opa/foia/hot\\_4.html](http://www.osha.gov/as/opa/foia/hot_4.html)> (last visited Feb. 12, 2008).

20. See *Jeffress Says Letter Overstated OSHA Policy, But That Some At-Home Work of Concern*, DAILY LAB. REP. (BNA), Jan. 19, 2000, at A-7.

21. OSHA CPL-02-00-12 (2000).

22. For example, if an employee is injured while driving his son to a soccer game and talking on his cell phone to his supervisor about work, is he entitled to workers' compensation benefits? Is the time compensable under the Fair Labor Standards Act?

23. See Peter Blanck et al., *Employment of People with Disabilities: Twenty-Five Years*

with Disabilities Act and other disability discrimination laws, however, have struggled with the question of whether the law requires employers to accommodate individuals with disabilities by allowing them to work at home and facilitating such work.<sup>24</sup>

In recent years, electronic technology has enabled employers to engage in constant supervision of employees at work, as well as to access employees' electronic communications. Critics have lamented the privacy implications of both the increased and constant employer monitoring of employees.<sup>25</sup> As technology advances, additional issues arise. Among the current issues are the employer's use of employee tracking technology to monitor employees and employer restrictions on employee blogs.<sup>26</sup> While there is no dispute that employers have the right to engage in some monitoring of employees to ensure that they are engaging in productive work and not violating workplace rules, the ability to conduct constant monitoring with electronic

*Back and Ahead*, 25 LAW & INEQ. J. 323, 332-37 (2007).

24. See, e.g., *Mason v. Avaya Comm'ns., Inc.*, 357 F.3d 1114 (10th Cir. 2004) (finding the employee's request for an at-home accommodation due to incident causing post-traumatic stress disorder was unreasonable on its face because it sought to eliminate an essential function of her job); *Rauen v. U.S. Tobacco Mfg.*, 319 F.3d 891 (7th Cir. 2003) (finding that some of the employee's job functions required presence in the workplace weighing against the reasonableness of her request to work at home); *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128 (9th Cir. 2001) (reversing the denial of an employee's request to work at home to accommodate her OCD, holding that there was a triable issue of fact as to (1) whether plaintiff would have been able to perform the essential duties of her job with the accommodation of a work-at-home position; and (2) whether as matter of law denial of the request violated the reasonable accommodation requirement under the Americans with Disabilities Act); *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995) (finding no duty to allow an employee to work at home); *Chirico v. Office of Vocational & Educ. Serv. For Ind'ls with Disabilities*, 627 N.Y.S. 2d 815 (A.D. 1995) (affirming hearing officer's decision that rehabilitation agency must supply a voice-activated computer to allow high school guidance counselor to do paper work at home).

25. See generally L. CAMILLE HÉBERT, *EMPLOYEE PRIVACY LAW* § 8A:3 (2003 & Supp. 2007-08).

26. See Jason Boog, *Employers Wrestle with "Blogosphere,"* NAT'L L.J., Apr. 4, 2005, at 5; *Daily Rise in Business Blogging Affects Data Retention, Privacy*, 179 LAB. REL. REP. (BNA) 521 (July 31, 2006) (indicating that business blogs – read by customers, colleagues, and employees – hold potential for business growth, but also raise potential risks and liabilities, including issues related to privacy, data retention, and spam); *Employee Tracking Technology Raises Privacy Concerns and Potential Employee Backlash*, DAILY LAB. REP. (BNA) No. 80 (Apr. 27, 2004); Lyda Phillips, *Pitfalls Abound for Employers Lacking Electronic Information Retention*, 183 LAB. REL. REP. (BNA) 141 (Jan. 14, 2008) (highlighting employers' growing concern about blogs and the need to monitor them since they may be subpoenaed); *Survey: Despite Litigation, Firings, Few Firms Possess Blog Policies*, 179 LAB. REL. REP. (BNA) 277 (May 22, 2006) (noting that only about one in five U.S. companies have a formal process in place for monitoring blogs for comments written about their companies, even though about one in eight have fired someone or taken legal action because of a blog); *Technology Issues Outpace Guidance From NLRB, Attorneys Tell ABA Conference*, DAILY LAB. REP. (BNA) No. 46 (Mar. 10, 2005); Tom Zeller, Jr., *When the Blogger Blogs, Can the Employer Intervene*, N.Y. TIMES, Apr. 18, 2005, at C1.

technology, as well as the increasing invasiveness of that technology, has altered the nature of supervision.<sup>27</sup> As the cost of technology enabling such monitoring has decreased, monitoring has increased and, according to critics, raised employee stress levels.<sup>28</sup>

Among the legitimate reasons for employer use of technology for investigation and monitoring are the need to hire and retain those workers who will be most productive. Employers want to insure that employees are working effectively and efficiently.<sup>29</sup> They are also concerned about potential liability for injury to employees or third parties.<sup>30</sup> Further, employers desire to prevent loss of confidential information and breaches of computer security.<sup>31</sup> Finally, when some problem occurs, such as missing inventory or data corruption, employers seek to determine the cause of the loss.

Despite the legitimacy of employer motives,<sup>32</sup> employer practices intrude on employee privacy interests. Employees desire to protect and control the use of their personal information.<sup>33</sup> Some of that private information is quite private indeed, such as confidential communications with attorneys that may travel over an employer's e-mail system or be stored on an employer laptop computer.<sup>34</sup>

27. For example, employers are using tracking systems on company vehicles to monitor employee location, driving speed, and time of stops. See *Employee Tracking Technology Raises Privacy Concerns and Potential Employee Backlash*, supra note 26. Identification badges are used directly on employees to determine how long employees spend on particular tasks and in certain locations. See *id.* Cell phones and handheld computers can also be used to track employees. See *id.* Employers are even using infrared technology on bathroom sinks and soap dispensers to see how long employees spend washing their hands. See *id.*

28. See William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 102-03 (2003).

29. It has been estimated that "cyber-loafing," employees surfing the internet at work, costs businesses \$54 billion per year. *Workers, Surf at Your Own Risk*, BUS. WK., June 12, 2000, at 105.

30. Some companies have settled sexual harassment suits based on e-mails at the cost of several million dollars, while others have fired employees who sent sexually offensive e-mails, presumably to avoid such claims. See *id.* at 105.

31. Indeed, employer concerns about privacy of employee, customer, or citizen data may prompt monitoring or restrictions on the use of certain technologies. See TLK2UL8R: The Privacy Implications of Instant and Text Messaging Technologies in State Government, Research Brief, National Association of State Chief Information Officers, at 6, 7, available at <<http://www.nascio.org/publications/documents/NASCIO-instantMessagingBrief.pdf>> (2005) (last visited Apr. 19, 2007).

32. Certainly, there are improper motives for employer monitoring as well, including curiosity, voyeurism, and interference with employee efforts to unionize. See Dennis R. Nolan, *Privacy and Profitability in the Technological Workplace*, 24 J. LAB. RES. 207, 215-16 (2003).

33. Robert L. Belair, *Employee Rights to Privacy*, in PROCEEDINGS OF NEW YORK UNIVERSITY THIRTY-THIRD ANNUAL NATIONAL CONFERENCE ON LABOR 3, 4 (1981).

34. See *Kaufman v. SunGard Inv. Sys.*, Civil Action No. 05-cv-1236 (JLL), 2006 WL 1307882 (D.N.J. May 10, 2006) (employee held to have waived attorney-client privilege with respect to communications with her attorney because they were stored on employer-provided

Additionally, employees have a privacy interest in freedom from excessively intrusive regulation or surveillance of their behavior,<sup>35</sup> including employer conduct that seeks information about employees' off-duty activities or even private communications that occur in the context of the workplace.<sup>36</sup> These privacy interests clash with legitimate employer interests, requiring some reconciliation by law or agreement.

According to an American Management Association study in 2001, 82.2 percent of major U.S. employers were "actively recording and/or reviewing employee communication and behavior in the workplace" using electronic monitoring.<sup>37</sup> Monitoring increased dramatically in the short time period between 1997 and 2001.<sup>38</sup> The 2007 AMA survey on electronic monitoring and surveillance shows that monitoring has continued to increase since 2001.<sup>39</sup> Sixty-six percent of employers surveyed reported that they monitored employees' internet connections, and 30 percent of respondents indicated that they had fired workers for inappropriate internet use. Forty-five percent of employers surveyed indicated that they tracked "content, keystrokes and time spent at the keyboard."<sup>40</sup> Forty-three percent of employers kept and reviewed employees' computer files. Forty-three percent also stored and reviewed employees' e-mail; of those employers, 73 percent used technology to automatically monitor e-mail, and 40 percent assigned an individual to manually read e-mail.<sup>41</sup> Twenty-eight percent of employers had terminated an employee for violating an e-mail policy.<sup>42</sup> Monitoring of telephone

laptop, even though she attempted to delete them when she returned the laptop to her employer, because of existence of employer policy of monitoring employee e-mail). *But see* Nat'l Econ. Res. Assocs., Inc. v. Evans, No. 04-2618-BLS2, 2006 WL 2440008 (Mass. Super. Ct. Aug. 3, 2006) (employee held not to have waived attorney-client privilege with respect to e-mails received on personal password-protected e-mail account, even though stored on employer provided laptop, when employee deleted messages and they were retrievable only by someone with substantial computer expertise). *See also* HÉBERT, *supra* note 25, § 8A:33.50.

35. Belair, *supra* note 33, at 4.

36. *See* HÉBERT, *supra* note 25, §§ 8A:1, 8A:3.

37. Ron Bigler & Will Petzel, *Employer Snooping: What Rights Do Workers Really Have?*, Feb. 13, 2002, available at <<http://www.workinglife.org/wiki/Employer+Snooping:+What+Rights+Do+Workers+Really+Have%3F+>> (last visited Apr. 21, 2007).

38. Matthew W. Finkin, *Information Technology and Workers' Privacy: The United States Law*, 23 COMP. LAB. L. & POL'Y J. 471, 474 (2002).

39. AM. MGMT. ASS'N, 2007 ELECTRONIC MONITORING AND SURVEILLANCE SURVEY, <<http://www.amanet.org/research/pdfs/electronic-monitoring-surveillance-survey08.pdf>> (last visited Mar. 13, 2008) (registration required) (hereinafter AMA, 2007 Survey).

40. *Id.* at 1. The survey consisted of 304 employers of various sizes. *Id.* at 13.

41. *Id.* at 2.

42. *Id.* at 1.

conversations and video surveillance was also conducted by a relatively large number of employers. In the 2007 AMA survey, forty-five percent of responding employers indicated that they monitor time spent on the telephone and numbers called, while another 16 percent record telephone conversations. Forty-eight percent of employers responding to the survey indicated that they used video monitoring.

Two of the articles in the symposium address issues of electronic monitoring. Professor Wendy Carroll's article analyzes the empirical research on the impact of electronic monitoring, performing a meta-analysis of a series of studies of the phenomenon.<sup>43</sup> Based on her review, she concludes that electronic performance monitoring with feedback correlates with improved employee performance.<sup>44</sup> Factors such as employee perception of fairness and control can enhance positive performance effects.<sup>45</sup> Carroll also finds a smaller than expected negative relationship between the intensity of monitoring and employee performance.<sup>46</sup> Based on her conclusions, she highlights directions for future research in this area.<sup>47</sup> This empirical research may aid employers in deciding how to engage in such monitoring and may also provide important data for policymakers deciding how to balance the interests of employers and employees with respect to such monitoring.

Attorney William Herbert's article alerts us to the legal developments relating to the issue of employee privacy and employer monitoring.<sup>48</sup> As he explains, there is no overriding legal framework for addressing these issues.<sup>49</sup> Instead there is a patchwork of laws, federal and state, common law and statute, that has evolved with, or perhaps more accurately trailed, the developments in technology.<sup>50</sup> As Herbert points out, there are advocacy groups pushing for solutions, but no real comprehensive effort to develop a legal regime to accommodate the legitimate interests of employers and employees,

43. Wendy R. Carroll, *The Effects of Electronic Performance Monitoring on Performance Outcomes: A Review and Meta-Analysis*, 12 EMP. RTS. EMP. POL'Y J. 29 (2008).

44. *Id.* at 42.

45. *Id.*

46. *Id.* at 43.

47. *Id.* at 44.

48. William A. Herbert, *The Electronic Workplace: To Live Outside the Law You Must Be Honest*, 12 EMP. RTS. & EMP. POL'Y J. 49 (2008).

49. *Id.* at 55-56.

50. *Id.* at 57.

along with the broader societal interests.<sup>51</sup> Herbert laments the very recent lost opportunity to develop such a framework in the *Register-Guard* decision of the NLRB,<sup>52</sup> and calls for a broad look at the implications of technology with the goal of developing a balanced approach to the law and employer practices.<sup>53</sup>

In the meantime, the pace of technological change has not abated. Microsoft has applied for a patent for a system that would allow companies to measure employees' physiological condition through a wireless sensor that links the employee to his or her computer.<sup>54</sup> Microsoft touts the benefits of the system, which would signal employee stress by measuring heart rate, body temperature, movement, facial expression, and blood pressure, permitting management to offer assistance to the frustrated employee.<sup>55</sup> Perhaps the physiological aspects of the monitoring, like the polygraph<sup>56</sup> and genetic testing,<sup>57</sup> will trigger public pressure for legislative response.

Unlike the United States, many other countries have addressed these issues comprehensively.<sup>58</sup> A number of countries have legislation addressing privacy in general or workplace privacy in particular, and, in addition, have involved the representatives of employees in crafting solutions to the conflict between employee privacy and employer interests.<sup>59</sup> In the United States, however, labor unions represent a relatively small percentage of the work force and have not been extensively involved in addressing these issues in

51. *Id.*

52. *Guard Publishing Company d/b/a The Register-Guard*, 351 N.L.R.B. No. 70 (Dec. 16, 2007).

53. Herbert, *supra* note 48, at 84-100.

54. Alexi Mostrous & David Brown, *Microsoft Seeks Patent for Office "Spy" Software*, LONDON TIMES, Jan. 16, 2008, at 1, available at <[http://technology.timesonline.co.uk/tol/news/tech\\_and\\_web/article3193480.ece](http://technology.timesonline.co.uk/tol/news/tech_and_web/article3193480.ece)> (last visited Mar. 17, 2008).

55. *Id.*

56. See Employee Polygraph Protection Act, 29 U.S.C. §§ 2001-09 (2000).

57. In May 2008, President Bush signed into law the Genetic Information Nondiscrimination Act of 2008 which bars discrimination based on genetic information by employers, employment agencies, labor unions and health insurers. See Pub. L. No. 110-233, 122 Stat. 881 (2008). With limited exceptions, the law also prohibits covered entities from requiring employees to provide genetic information and imposes confidentiality obligations regarding information held by these entities. See § 204, 121 Stat. at 909; § 205, 121 Stat. at 913.

58. For a comparative study of the approaches of twelve countries to electronic technology in the workplace, see Symposium, *A Comparative Study of the Impact of Electronic Technology on Workplace Disputes* 24 COMP. LAB. L. & POL'Y J. 1 (2002); see also CATHERINE DELBAR ET AL., INSTITUT DES SCIENCES DU TRAVAIL, NEW TECHNOLOGY AND RESPECT FOR PRIVACY AT THE WORKPLACE (2003), available at <<http://www.eiro.eurowfound.ie/2003/07/study/tn0307101s.html>>.

59. Ann C. Hodges, *Bargaining for Privacy in the Unionized Workplace*, 22 INT'L J. COMP. LAB. L. & INDUS. REL. 147, 173-78 (2006).

collective bargaining.<sup>60</sup>

The workplace certainly will continue to change with the electronic advances that proceed apace. Perhaps as the pace of change accelerates and the issues multiply, a comprehensive legal approach will evolve. More likely, however, the law will continue to address the subject in piecemeal fashion. One other thing is certain as a result, however. There will continue to be legal work for employment lawyers representing employers, employees, and government agencies.

60. *Id.* at 178-81.