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## Ninth Circuit Reaffirms Need for Employers to Establish and Communicate Electronic Monitoring Policies

The Ninth Circuit Court of Appeals has confirmed that while employees may have a reasonable expectation of privacy in their workplace computers, an employer who has a policy of monitoring those computers may lawfully access that data and provide it to the government.

The ruling in *United States v. Ziegler* on January 30, 2007 stems from an attempt by Jeffrey Ziegler, the former Director of Operations of Frontline Processing Corporation, a California-based online electronic payments processor, to prevent the government from introducing child pornography images seized from his company computer at his criminal trial. Frontline had a computer monitoring policy in place and consistently monitored its employees' Internet activities. Frontline detected that Mr. Ziegler had accessed child pornography and notified the FBI. It later seized those images from Mr. Ziegler's computer at the FBI's request.

The Ninth Circuit initially held in an August 2006 ruling that Mr. Ziegler had no constitutional right of privacy in his workplace computer and it refused to suppress the seized files. After granting a petition for rehearing, the Ninth Circuit reached the same conclusion in its January 30, 2007 ruling, but it took a dramatically different, employee-friendly route to arrive there.

The court found that employees like Mr. Ziegler who maintain a private office do, in fact, "retain at least some expectation of privacy in their offices," and are protected by the Fourth Amendment from "unreasonable" warrantless searches and seizures. However, in this case, Frontline possessed "common authority" sufficient to consent to a government search of Mr. Ziegler's company computer because it apprised its employees through training and its employment manual that its computers were company-owned, should not be subject to

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personal use and were subject to company monitoring. The company's consent to search the company-owned computers, the Ninth Circuit found, was therefore consistent with the Fourth Amendment.

The Ninth Circuit's ruling in *Ziegler* underscores the importance of establishing an electronic monitoring policy and clearly communicating that policy to employees. The absence of a clearly communicated policy may limit an employer's ability to monitor their employee's computer use and take action upon the information retrieved during monitoring. Employers should seek the advice of employment counsel to help formulate and implement electronic monitoring policies to ensure those policies are consistent with federal and applicable state laws.

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*If you have any questions regarding the subject covered in this Alert, or any related issue, please feel free to contact Jennifer B. Rubin at [JBRubin@mintz.com](mailto:JBRubin@mintz.com) or 212.692.6766, or any of Mintz Levin's *Employment, Labor and Benefits* practice attorneys.*

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