

## CHAPTER 6

# EMPLOYEE PRIVACY, MONITORING, AND NEW TECHNOLOGY

## I. INTRODUCTION

MARCIA L. GREENBAUM\*

Briefly let me set the framework for this topic. Monitoring and surveillance of employees is not new. Supervisors looked over employees' shoulders long before Fredrick W. Taylor used his stopwatch to time employees shovelling pig iron. No one suggested that this was an invasion of privacy.

More recently employees not only have been observed but also have been asked to open their lockers, lunch boxes, briefcases, desk drawers, and other personal effects when the employer has suspected theft and pilferage of product or equipment, or possession, use, or sale of drugs or alcohol on company premises. In some instances hidden cameras or undercover agents or both have been employed to monitor misconduct in the workplace such as horseplay, harassment, and defacing elevator walls with graffiti. They have also been used to conduct surveillance off company time and property, for example, when workers receiving compensation for on-the-job injury are suspected of feigning disability while performing heavy work for another employer. Perhaps considered most intrusive is the use of video cameras in washrooms and locker facilities in efforts to enhance productivity and control break time as well as to monitor misconduct. Workers feel they are being told, "Smile—you're on company camera!"

Other technological advances bearing on employee privacy include polygraph testing, random drug testing, and AIDS testing. Some are even thinking about genetics testing with an eye towards employing a healthier and more productive work force. Most recently monitoring employees in the workplace by electronic and technological means has increased. The National Institute for Occupational Safety and Health estimates that two

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\*Member, National Academy of Arbitrators, Essex, Massachusetts.

thirds of the 13 million users of video display terminals (VDTs) are monitored in some way. One reason is that the technology is readily available and less costly.

Monitoring takes several forms:

1. Supervisors listen in to the content of telephone conversations between employees and customers. Such "service monitoring" of telephone operators is used by the Bell System, by telemarketing and mail order companies, and by airlines, whose reservation sales agents are rated on the basis of number of calls handled and bookings made.

2. Computerized systems are used to keep track of the amount of phone use, including length of calls and destination, to manage telephone costs.

3. The most controversial area is computer monitoring, where VDTs keep track of employee productivity and activity—or lack thereof—by counting keystrokes, error rates, the time taken to complete each task, and the time away from terminals for breaks or other reasons. Printouts are provided to supervisors who use them to determine production standards and pay rates, to monitor speed and accuracy, to evaluate performance, and to discipline for failure to perform in a satisfactory manner. Workers have countered by holding one key down continuously to make the keystroke count go up. The antidote is a software package which detects this deception. Some have considered these practices an extension of George Orwell's "big brother or sister is watching you."

Questions have been raised regarding stress and its impact on employ health, job quality, and standards of performance. Civil liberties issues have been cited relating to privacy rights and protection from unnecessary intrusions. Management, unions, and arbitrators have become involved in a balancing act between the right and obligation of the employer to provide a safe, healthy, productive, and efficient workplace, and the right of employees to privacy, particularly when personal business is involved; the right to know when monitoring and surveillance takes place; and the right to due process when information gained through these means is used to affect job security and to discipline workers.

## II. MONITORING AND NEW OFFICE SYSTEMS

ALAN F. WESTIN\*

**The Growth of Employee Privacy Rights**

Over the past decade, issues of employee rights to privacy at the workplace have become a major theme in the overall employee rights movement and in the debates over what law and public policy ought to do in this area.

First, an impressive group of players have become involved: the new individual-employee plaintiffs' Bar, civil liberties groups, unions, employers and employer-associations, the mass media, legislators and judges, arbitrators, and ultimately, 100 million employees and managers at the nation's workplaces, both public and private.

Second, the kinds of employee privacy issues that have surfaced span a tremendous range of concerns. In the hiring and personnel administration areas, fierce debates rage over testing for drug and alcohol use, polygraph (lie detector) testing, the use of psychological or so-called honesty tests, searches of employee desks, lockers, and other enclosures, and finally confidentiality for sensitive employee personal data collected by the employer. There has been sharp debate over the proper line to draw between off-the-job personal and political activity that is wholly the employee's own affair and that which affects the employer's business and supports employer intervention. There has also been a continuation of traditional employee privacy issues, such as employer use of closed-circuit TV monitoring of work areas, collection of call accounting records to track nonbusiness use of the telephone by employees, and surveillance by employers of on-the-premises union organizing or union-representation activities.

What this brief checklist of players and issues reveals is that our society over the past decade has begun to wrestle seriously with a redefinition of the traditional constitutional rights that employers ought to respect and Americans at the workplace ought to enjoy.

As someone who has been a scholar and an advocate of privacy rights for 35 years, I warmly applaud this movement and have

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\*Professor of Public Law and Government, Columbia University, New York, New York.

been trying to advance its progress actively year after year. At the same time, I believe that we must apply good research, logic, and social-policy analysis to the definitions of new privacy interests in work settings, and we must recognize that the interests of some of the major players in these emerging debates do not necessarily and automatically add up to the public interest or the interests of the majority of American employees.

It is from this perspective of reasoned advocacy that I undertake the assignment I was given on this panel: to discuss the uses of new office technologies to monitor work and workers and to examine the issues of workplace privacy.

### **VDTs: New Technology for Office Work**

Specifically, our topic is the use by employers of the software capacities of office systems technology (through the CRT or VDT device on the employee's desk) to monitor the quantity or quality of work. The move into office automation has made the video display terminal (VDT) a staple in most American offices. About 15 to 20 million VDTs are operating at workplaces, are used by the entire range of occupations from clerical workers to executives, and have become one of the central, driving forces in the reorganization of office and customer-service work that marks the 1980s. As customers, clients, and citizens, we now take for granted the speed, efficiency, precision, and customizing of services that new office systems technology has made possible.

In the course of interviewing over 1,100 clerical, professional, and managerial workers between 1982 and 1986, as part of a study of office automation impacts, we heard the majority of VDT users (over 90 percent) say unequivocally that they could not imagine or ever accept going back to the old ways of performing their assigned tasks.<sup>1</sup> At the same time, the ways that VDTs have been introduced have generated some important social-policy issues. These involve the need for good ergonomic or human-factor conditions in the machines, the workplace arrangements (such as desks and chairs), and the work environment (such as lighting and worker interaction). Other key issues involve the pacing and intensity of VDT work, production standards, undue stress, and a variety of health and safety con-

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<sup>1</sup>Westin, Schweder, Baker, and Lehman, *The Changing Workplace* (Westchester, N.Y.: Knowledge Indus., 1985).

siderations. In the past decade since office automation swept into American workplaces, much has been learned about what it takes to use this technology effectively, safely, and productively, and to insure the positive aspects of this tool for workers.

Based on field work of employer use of VDTs and employee responses, it is my empirical judgment that the majority of U.S. employers in the business, government, and nonprofit sectors have learned what is required to make this technology positive and acceptable to their employees, and are presently doing this or installing what is needed.<sup>2</sup>

### Use of VDTs for Work Monitoring

However—and this is what we are discussing today—there remain important issues beyond ergonomics, job design, and traditional employee relations. One of the most well-publicized issues in the past few years is employee monitoring—the use of new office technology to do one or both of two things:

1. Collect data on the transactions taking place on the individual VDT: when the employee signs on and off, how many keystrokes are performed or how many calls are completed in a given time unit, and how long the employee is in “waiting” time and when performing work.

2. Listen in on the telephone calls of customer service employees as they perform official duties on the job—talking to customers and potential customers—to ascertain whether the employer’s rules and procedures for that job are being followed, whether the employee is courteous and efficient, and other job-related examinations.

The distinctive aspect of such monitoring of VDT-based work is that office systems technology now makes it efficient and easy for the employer to collect data about the employee’s performance for every moment that the employee is using the VDT, and, for telephone work, to listen in (without the employee’s specific awareness at that moment) on the employee’s handling of customer calls.

How much is this actually being done by employers who have installed VDTs? My own fieldwork, and a wide range of union, government, and scholarly reports, do not give accurate figures.

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<sup>2</sup>Westin, *U.S. Employer Policies in Using VDTs, Work With Display Units* (Stockholm, 1987).

But, it is reasonable to infer from all the studies that most employers are collecting data from VDTs for statistical and load-analysis purposes. A sizable minority of employers are collecting data on individual VDT operators (especially data entry, customer service, and word-processing workers) to make evaluative individual personnel judgments. And a majority of employers who conduct extensive customer service telecommunications work do listening-in, or what they call "service observing." This typically involves telephone directory assistance; reservations work for hotels, airlines, and car rentals; customer-response work for public utilities, banks, and insurance firms; credit and collections work; and public-contact or client-contact work by local, state, and federal government agencies, such as the motor vehicle departments, the IRS, and the Social Security Administration.<sup>3</sup>

### **Two Competing Views of VDT Work Monitoring**

As public discussion of this VDT-based employer monitoring has unfolded during the last few years, two stylized positions have emerged. Let me summarize each without unfair characterization.

Opponents of employee monitoring regard it as "Big Brother" at the workplace. They focus on the capability of the supervisor to track every movement and activity of the employee at the VDT for every minute of time at the machine, which for many clerical employees is virtually the whole working day. Such "total, continuous, and pervasive" tracking by supervisors is contrasted with traditional occasional watching or monitoring in person, which is seen as having a limited and "human" character. Monitoring by technology is seen as creating harmful stress and robbing workers of dignity. As for listening-in on telephone customer-service calls, critics charge that this improperly invades not only a privacy interest of the employee but also privacy interests of the customer on the line, who does not know and, it is asserted, would not want to have a supervisor listening to those calls. The conclusion of these critics is that all such employer monitoring should either be prohibited by law as an invasion of

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<sup>3</sup>Westin, *Privacy and Quality-of-Work-Life Issues in Employee Monitoring* (Report to the U.S. Office of Technology Assessment, Washington: December, 1986); Office of Technology Assessment, *The Electronic Supervisor* (Washington: OTA, 1987).

privacy or be subjected to protective regulation, such as requiring an audible “beep” tone to be heard whenever supervisory monitoring of customer-service calls takes place.<sup>4</sup>

Supporters of employee monitoring argue that supervision of the quantity and quality of work is as old as organized work itself and that counting units produced or having supervisors listen in periodically to the procedures and courtesy of telephone work was widespread long before VDTs and telecommunications technology arrived. They assert that ensuring productivity and courtesy are absolute requirements for business survival or government-agency responsibility to taxpayers and that using the software capacity of VDT systems to obtain transactional data provides the most objective and well-recorded basis possible for making fair evaluative decisions about the employee’s performance. The occasional listening in by supervisors to observe service is the only way that employers can learn (short of hovering over the operators) whether calls are being handled courteously and according to legitimate employer rules and standards. Since no evidence has been submitted that supervisors misuse customer conversations, the privacy claim is unfounded. Supporters conclude that if there are unfair production standards or time requirements for telephone-call handling, or if employees are experiencing arbitrary supervision, these are traditional employee relations issues that union representation or the job market in a time of scarce clerical help can remedy. To outlaw monitoring or to impose a beep tone requirement would make it impossible to get average-performance data and would be unnecessary and harmful interventions.<sup>5</sup>

### Existing Law on Privacy

How should we evaluate these conflicting positions? First, let’s look at existing law. With regard to constitutional law and its rules for the government employer, new judicial doctrines recognizing reasonable expectations of privacy for employees (for

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<sup>4</sup>See, for example, VDT Syndrome: The Physical and Mental Trauma of Computer Work (Washington: Service Employees, 1987).

<sup>5</sup>See, for example, Testimony of Laura Dale, on behalf of the Direct Marketing Association and the American Telemarketing Association, in Hearings on H.R. 1950 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 100th Cong., 1st Sess. (1987).

example, limiting employer searches of private desks)<sup>6</sup> would not seem to apply to work monitoring. Clerical and customer-service operations are done in "public-type" areas at work sites, under direct and socially accepted norms of supervisory oversight. Therefore, in terms of privacy of place or activity, emerging judicial notions as to reasonable expectations of privacy are not likely to be applied.

With regard to legislative action, the pattern is more complex. Despite union opposition, Congress decided that service monitoring of work-based telephone calls was not a privacy invasion to be forbidden by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the basic wiretapping law. An express exception for telephone service observing was put into that statute.<sup>7</sup> In its 1973–1975 study of the operations of this law, the National Wiretapping Commission, on which I served, examined the practices of employers under this exception and concluded that it should be retained, leaving it up to labor-management negotiations to determine whether or how such conduct should be used at any union-represented establishment. Critics of service observing could offer no evidence then—nor have they recently—that supervisors use overheard conversations of customers in any privacy-violating manner.<sup>8</sup>

However, several state public utility commissions in the past decade have established rules for employer use of telephone-service monitoring. These require that employees be notified in advance that periodic listening-in is to be done, that no recordings or notes of the content of monitored conversations be made, and that an asterisk be placed in the telephone directory to inform the public calling the number that service observing is being done. In no state today is employer service observing prohibited.<sup>9</sup>

It is clear that non-work-related privacy interests of employees are protected under existing wiretap laws, as shown in a 1983

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<sup>6</sup>*O'Connor v. Ortega*, 480 U.S. —, 55 USLW 4405 (1987). For an analysis of American law and policy approaches to employee privacy based on the five elements of person, activity, technique, use, and safeguards, see Westin, *supra* note 2 at 6–8 and 133–155.

<sup>7</sup>Title III, Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §2500 (1968). The exception for monitoring for "mechanical or service quality control" is in §2511(2)(a)(i).

<sup>8</sup>Electronic Surveillance: Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance (Washington: Government Printing Office, 1976).

<sup>9</sup>See Smith, *Compilation of State and Federal Privacy Laws, 1987–1988 ed.* (Washington: Privacy Journal, 1988).



ruling.<sup>10</sup> A supervisor at the L.M. Berry Company was listening in to an employee's telephone call under a known and standard performance observing procedure, using an extension phone. The supervisor heard this woman employee discussing a new job she was considering, and which she shortly afterward took, leaving the Berry Company employ. The supervisor had words with the employee about her leaving, during which it became known to the employee that her supervisor had listened in to her earlier telephone call. The employee sued under Title III, and the U.S. Court of Appeals held that her reasonable expectation of privacy under the statute had been violated. While supervisory monitoring was authorized under Title III, the court explained, this was allowed only for checking the quality and rule-compliance of the employee's work. As soon as the supervisor heard a conversation that related to the employee's "personal affairs," the court said, the supervisor was required to hang up, and the continued listening in to her "private conversation" violated Title III.

In line with the policy recognized in this ruling, most employers tell customer-service operators that those lines are not to be used to make personal calls, and they provide coin telephones in nearby locations for employees to use for such purposes, on which no listening-in is ever done. Many government agencies, such as the IRS, have put printed notices on forms dealing with telephone contacts from the public indicating that periodic service observing is done on those lines.<sup>11</sup>

Some state laws forbid the secret or covert use by employers of various surveillance devices to intrude into employee activities that legislators feel are entitled to privacy protection. Connecticut law, for example, forbids any employer to use electronic systems to record or monitor employees in restrooms, locker rooms, or lounges, or to record or monitor any conversation at the workplace "pertaining to employment contract negotiations," unless all parties to that conversation agreed to the recording.<sup>12</sup> But these laws do not apply to the service monitoring of work.

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<sup>10</sup>*Watkins v. L.M. Berry Co.*, 704 F.2d 577 (11th Cir. 1983).

<sup>11</sup>On private employer practices, see Westin, *supra* note 2, at 63-86, and for federal employer practices, at 48-63.

<sup>12</sup>Conn. Gen. Stat. §§31-48(b) and (c).

Finally, federal and state laws over the past decade have required that employers, when collecting information about employees and putting it into files used for personnel administration, must provide employees with access to such files.<sup>13</sup> Such laws clearly apply to records generated by work monitoring that are used for pay, promotion, disciplinary, or termination purposes by employers. My sense is that such requirements are widely observed by employers, and I am not aware of any case in which VDT monitoring was done and used in evaluation where the employer refused to provide access to the records and to the technical system under which the monitoring was done. In fact, detailed arguments over such records and systems by unions representing employees are a regular feature of arbitration cases involving VDT work monitoring.

### Arbitration and Collective Bargaining

This brings me to arbitration rulings involving work monitoring. Examining published arbitration awards from 1945 to the present, I find several well established trends. First, the decision to institute work monitoring is a management right and is not required to be bargained over.<sup>14</sup> I refer here to the kind of VDT work records and telephone-service observing we are discussing, and not the institution of closed circuit TV monitors, on which there have been a few rulings holding that this must be bargained over because it involves a condition for taking disciplinary action. Management's right to use work monitoring and customer-service observing has been upheld in both private and federal labor relations decisions.<sup>15</sup>

Second, arbitrators in recent years have examined the use of computer-generated data on work performance and service-observing evidence in disciplinary and termination hearings, and have treated the validity and weight of such evidence the same as any other material offered by the employer. That is, they examine sufficiency, burden of proof, and equality in application of standards with the same qualitative measures for computerized data as for anything else.<sup>16</sup> In no arbitration case that I have seen has computerized data or telephone-monitoring-

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<sup>13</sup>For a complete list of such statutes, see Smith, *supra* note 9.

<sup>14</sup>Civil Service Reform Act, 5 U.S.C. §7106(a)(A) and (B).

<sup>15</sup>See Perl, *Rising Performance Standards Keep Some Agencies on Edge*, Washington Post (September 3, 1984).

<sup>16</sup>See, for example, *Western Union Tel. Co.* (unpublished) (O'Grady, 1988); *Southwestern Bell Tel. Co.* (unpublished) (Goodstein, 1988).

based testimony been excluded from a hearing as inherently unreliable or untrustworthy.

Finally, I am aware of no arbitration ruling that has held that use of VDT monitoring or telephone observing is an invasion of employee privacy, and therefore an improper action by the employer.

Shifting from law and arbitration to collective bargaining, we find a steady effort by at least a dozen major U.S. unions over the past 30 to 40 years to write prohibitions or regulations of supervisory monitoring into labor contracts. Several industrial and office unions have won such clauses, usually providing that monitoring be used for training and assignment purposes but not directly for discipline. They provide that employees be told in advance about monitoring systems and techniques, and that employees have access to all records generated by monitoring and kept by the employer.<sup>17</sup> Such clauses are fine and can greatly improve the quality of work life as well as productivity in a unionized firm. In at least one major contract, monitoring of telephone work must be done from on-site monitoring machines rather than by off-site equipment. I am not aware of any contract that forbids employers to collect data on VDT work performance or to do periodic listening-in on telecommunications work.

### **Why Privacy-Based Intervention Is Not Warranted**

What about the larger social and legal policy issues that VDT monitoring raises? Given the proliferation of VDTs in this decade, and what we have learned about technology-people relationships in the age of information machines, should we be changing laws and regulating this area of employer conduct? Should this be an area in which arbitrators reach out to find improper and impermissible standards of conduct or unacceptable invasions of privacy?

I do not believe that regulation by law or by an arbitrator's importation of public-law standards is called for on privacy grounds. In my judgment, this is a basic labor-management issue, or, in nonunion settings, a basic employee relations issue. There are important questions involving fairness of the work measurement process and how it is conducted, and fairness of the evaluation and recognition criteria used in the observation. These are the kinds of concerns I have heard from hundreds of

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<sup>17</sup>See Service Employees International Union agreement with Equitable Life Assurance Society, Syracuse, N.Y., discussed in Westin, *supra* note 2, at 93-94.

employees that I have interviewed, primarily at nonunion but also at some union-represented workplaces. What really matters is the fairness of supervision and the overall climate of fairness in employer-employee relations,<sup>18</sup> rather than the presence of machine data collection or telephone listening-in. Those factors, along with proper ergonomics, job design, compensation, and advancement opportunities, as well as EEO policies, make employees either feel that there is unacceptable stress and indignity at their automated workplaces or that management is being objective and fair in using monitoring.

To give one concrete example, I recently conducted an anonymous, companywide random sample of the employees at Federal Express, with almost 600 employees responding. Analysis against overall employment statistics showed that we obtained a statistically random sample of the Federal Express work force. Employees knew that their answers—all anonymous—came directly to me and would not be seen by the company, so full freedom of expression was given. Most of these employees were either customer-service operators, who used VDTs and telecommunications to take delivery orders and answer customer queries (and whose work and calls were monitored) or couriers picking up and delivering packages, whose movements were tracked by an electronic wand and location system in their vans.

The following question was put to them: "Employees in some companies complain that management monitors their work too closely, creating a Big Brother atmosphere. Other employees feel that management does only as much monitoring as necessary to ensure productivity and good performance. For your type of job and at your own location, how do you regard the monitoring that is done?" About two out of three Federal Express employees (64.2%) said the monitoring done was "about right." About 10 percent said there was "not enough" monitoring, and about 15 percent there was "a little too much." Only one in ten employees (9.8%) answered that management did "much too much" monitoring.

### **Privacy Rights Should Not Be "Stretched" Improperly**

The interviews that we have done at over 150 companies and government agencies suggest that these replies are similar to those of employees at most other workplaces. Where employees

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<sup>18</sup>See page 175 for a more detailed presentation of the fairness issues discussed here.

told us that they were angered and stressed by monitoring, our interviews invariably found that it was really the fairness of work standards, measurement techniques, and evaluative criteria that were the cause, not the monitoring per se. The mere banning of monitoring in such workplaces without the provision of overall fairness and equity in employee relations would not present progress. In fact, it could cause a return to favoritism, subjectivity, and discrimination in supervisory evaluations, since it would withdraw the one essentially objective and factual component of employee evaluation.

Some observers might say, why not use the invasion-of-privacy issue and the good emotional and political-ally sentiment this attack on the computer and Big Brother can generate to champion better treatment of employees? Isn't the end just, even if the basis of the argument is shaky as a matter of true privacy analysis and employee feelings? Are you pro-privacy or not, when the time comes to stand up and be counted with those that joined you in so many other privacy-protection causes?

My answer has to be that the end does not justify the means in this instance any more than others. There is oppressive, dignity-destroying, and unfair monitoring of employees and there is monitoring that is fair, dignity-respecting, and a proper tool of personnel administration. I am an advocate of the fair and proper use of monitoring, and I write and speak constantly to advance its use by all employers. I am also too devoted an advocate of privacy rights in American society to join those who want to stretch that basic right and concept beyond its proper limits. To do that is neither good theory nor good tactics, and risks creating confusion and backlash that could retard the expansion of genuine privacy protections for employees in all the dimensions that I noted in my opening.

I hope arbitrators will see this and agree with my conclusion, both in their work as arbitrators and in their roles as citizens.

### **Fairness Issues Involved in Employer Use of Work Monitoring and Service Observing<sup>19</sup>**

1. *Fairness of Work Standards: Standards or Criteria*

- Do standards fairly reflect the average capacities of the particular work force?

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<sup>19</sup>From Westin, Privacy and Quality-of-Work-Life Issues in Employee Monitoring, Report to the U.S. Office of Technology Assessment (December 1986).

- Will they create unhealthy stress for many employees?
- Do they take into account recurring system difficulties and other workplace problems?
- Do they include qualitative as well as quantitative goals?
- Do they represent a “fair day’s pay” for a “fair day’s work?”
- Do employees share in any productivity gains achieved through introduction of new technology?

2. *Fairness of the Measurement Process: Standards or Criteria*

- Do employees know and understand how the measurements are being done?
- Can the measurement system be defeated easily, thereby impairing the morale of those willing to “follow the rules?”
- Do employees receive the statistics on their performance directly, and in time to help them manage their work rate?
- Is the relation between quality and service measures and work quantity communicated by supervisors when they discuss problems with performance levels with employees?
- Do supervisors communicate clearly that they are taking system and workplace problems into account?
- Are group rather than individual rates used when particular tasks make such an approach more equitable?
- Is there a formal complaint process by which an operator can contest the way work data have been used by the supervisor?

3. *Fairness in Applying Measurements to Employee Evaluation: Standards or Criteria*

- Are there meaningful recognition programs for these employees?
- Is work quantity only one of a well-rounded and objective set of performance criteria used for employee appraisals?
- Does the employee get to see and participate in the performance appraisal?
- Is there an appeal process from the supervisor’s performance appraisal?
- Is there a performance-planning system that identifies employ weaknesses in performance and identifies ways to remedy such problems?