



OP-ED: Risky business: employers tracking employees via GPS

By: Nicole Elgin and Sean Ray in Compliance Corner September 22, 2016 2:09 pm

Employees who work inside an office can usually be tracked the old-fashioned way: visually. However, employees who routinely work outside an office (such as a delivery driver or an employee who works in the "field" at various locations throughout the day) provide challenges for employers looking to ensure those employees are on task during work hours. Concerns can range from whether the employee was at a particular location for a scheduled shift to whether the employee is clocking in before actual arrival at a job site.

Monitoring vehicles

Employers are increasingly turning to technology to solve this dilemma. The earliest programs that addressed this problem typically involved monitoring vehicles that employees used for work. This trend began with employers tracking employees via GPS devices installed on company-owned vehicles. When determining whether GPS monitoring is lawful, the courts will balance an employee's individual privacy interests against the employer's interest in being able to effectively monitor work performance.

Multiple courts across the country have explained that employers may lawfully monitor company-owned vehicles. One of the first workplace tracking cases involved an employer that had installed a GPS tracking device on a company-owned vehicle used by the employee to service vending machines. The employee filed suit against the employer arguing an invasion of his privacy interests. The court rejected that employee's argument because the employer had a right to know the location of the company-owned vehicle. In these situations, the employee's workplace essentially is the company-owned vehicle and therefore, monitoring does not unreasonably invade the employee's privacy interests.

However, courts have noted higher concerns for employees' individual privacy interests in cases where the employer monitors the employee's own car or where the employer monitors the employee's movement beyond strict working hours.

There's an app for that

While use of GPS to monitor employees began in vehicles, the technology is expanding rapidly with the advance of smartphones and applications. New apps and software programs can be used not only for tracking time, instead of manual timesheets, but also for GPS monitoring – a standard feature of smartphones today (just as anyone walking around town playing Pokémon GO).

A glance through an "app store" will show through the simple proliferation of such programs that more and more businesses are utilizing smartphone apps. They provide multiple functions, such as requiring employees to clock in and out on their phones, allowing employees to access scheduling information and other employment-related forms, and monitoring employees' location(s) during the workday. Employers should keep in mind that the courts have been hesitant to make broad, all-compassing rules about workplace technology before its impact on the workplace is fully understood.

There are certainly valid business reasons for an employer to want to know an employee's location during the workday. However, when GPS monitoring continues after an employee clocks out, employee privacy violations and other issues can arise. There is seemingly no valid business reason to know where an employee's friends live, what

he or she does for entertainment in the evenings, or which grocery store the employee prefers. In fact, such monitoring of "extracurricular" activities could lead to litigation against the employer.

For example, learning through GPS tracking that an employee goes to addiction counseling as a recovering alcoholic or frequents an establishment catering primarily to clientele of a certain religion or sexual orientation could result in liability to the employer if the employer's knowledge of that activity leads to an adverse employment action against the employee.

So, what is an employer to do? If a decision is made to track employees, ensure it takes place only during working hours. Consider using timekeeping apps designed to send GPS tracking information to the employer only during work hours or those that shut off GPS tracking when employees clock out for the day.

Employers should also disclose GPS monitoring programs to employees, such as in the employee handbook. Such disclosure ensures that employees understand and are aware that their time and movement during the workday will be monitored and that they do not have an expectation of privacy at work while using company vehicles or phones.

And, as with most employment law issues, if a concern arises, consult with counsel.

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