Impact | Understanding and Managing Business Risk

MONITORING YOUR EMPLOYEES THROUGH GPS: WHAT IS LEGAL, AND WHAT ARE BEST PRACTICES?

With the rise in GPS technology, employers have unprecedented access to their employees' whereabouts. For several years, employers have been able to track their field or mobile employees' locations through GPS devices in vehicles. With more recent technology, employers are able to track locations through GPS apps in employees' smartphones. But tracking presents risks employers need to understand so they can evaluate whether the potential benefits outweigh the significant risks.

Tracking employees' locations and activity through GPS can have many benefits for a business, including:

- Fostering increased efficiency through streamlined travel for delivery or other mobile employees.
- Monitoring overtime and compliance with labor laws.
- Ensuring compliance with safety regulations by confirming that employees are not speeding or otherwise violating traffic laws.
- Verifying that time records are accurate, company policies are followed and employees are engaging in safe behavior. Moreover, if an employee is suspected of wrongdoing, an employer can use GPS tracking as part of its internal investigation of the employee.

However, before an employer begins using GPS to monitor employees, it should consider the related legal ramifications and employee privacy issues. Employers should also implement best practices for complying with the law and ensuring that employee trust is not breached.

Monitoring employee vehicles

First, an employer should consider any state laws applicable to GPS tracking of individuals. For example, an Illinois statute enacted in 2014 makes it a criminal misdemeanor to use GPS tracking to monitor the location of a vehicle without the vehicle owner's consent, unless the tracking is lawfully done by a law enforcement agency. See 720 ILCS 5/21-2.5.

An employer does not violate this law by tracking the location of a company-owned vehicle used by its employees, because the employer (the vehicle's owner) consents to the tracking. However, an employer is not permitted to install a GPS tracking device in an employee-owned vehicle without the employee's consent. Other states, including California, Connecticut, Delaware and Texas, also have laws that
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specifically apply to GPS tracking.

Second, an employer should consider state tort laws that it may violate if it tracks employees without their knowledge or consent, such as invasion of privacy. Several courts have held that where an employer attaches a GPS tracking device to an employer-owned vehicle, an employee driving that vehicle is not able to state a claim for invasion of privacy when the employer tracks the whereabouts of the vehicle. See, e.g., Elgin v. Coco-Cola Bottling Co., 2005 WL 3050633 (E.D. Mo. 2005); Tubbs v. Wynne Transport, 2007 WL 1189640 (S.D. Texas, 2007). These cases track the Illinois statute, which allows an employer to install a GPS tracking device in a vehicle owned by the business. But one thing an employer may consider is giving notice to employees that it might use GPS monitoring in connection with employee use of company equipment.

The law is less clear, however, when an employer wishes to track employees who use their personal vehicles for company business. For example, a New York state court held that installing a GPS device on a vehicle personally owned by a state employee suspected of falsifying time records was an unreasonable search. Cunningham v. New York State Dept. of Labor, 21 N.Y.3d 515 (NY Ct. App., 2013). The court found that if the state had monitored the employee only during business hours, the search would have likely been lawful, but because the state monitored the employee during and after work hours, the entire search was unreasonable and unconstitutional. On the other hand, other courts have found that taxi drivers in New York City did not have an expectation of privacy in GPS data gathered from a tracking system that state regulatory authorities required to be installed in all cabs, even though the taxi drivers personally owned their vehicles. See, e.g., El-Nahal v. Yassky, 993 F.Supp.2d 460, 466 (S.D.N.Y., 2014).

Smartphone tracking

There is even less clarity in the law when it comes to tracking employees' locations through smartphones.

In May 2015, a woman sued her employer after she was terminated for uninstalling a GPS tracking app from a company-issued smartphone. Arias v. Intermex Wire Transfer, 15-cv-01101 (E.D. CA, 2015). While the case settled out of court in November 2015, it implicates several issues faced by employers wishing to track employees through company-issued GPS-enabled smartphones. Specifically, the plaintiff alleged that the employer required employees to leave their smartphones turned on at all times, and the employer allegedly told employees it would monitor their off-duty activity. Eventually, the plaintiff was terminated after she disabled the GPS tracking from her smartphone in order to protect her privacy. She filed suit claiming wrongful termination, invasion of privacy, unfair business practices, retaliation and other claims, seeking over $500,000 in damages for lost wages.
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Best practices for tracking

If a business owner wishes to employ GPS tracking to monitor employees, whether to maximize efficiency, ensure compliance with safety and traffic laws or to perform an investigation upon suspicion of wrongdoing, the employer should consider implementing the following best practices first.

- Become familiar with any laws applicable to privacy expectations and GPS tracking of vehicles and/or devices in the state where you wish to engage in GPS tracking.
- Only use GPS tracking in employer-owned vehicles or devices. The case law and statutes show that generally, tracking an employee using company-owned property is permissible, especially when the employee is aware of the GPS monitoring. Tracking employees using their personally owned property is still a legal gray area.
- Only monitor employees to the extent that it is justified by a business need. There are risks associated with tracking employees via GPS, namely that an employee will feel his or her privacy has been violated and commence litigation. Therefore, an employer should only consider engaging in monitoring to the extent that risk is offset by a business need.
- Make sure you have a written GPS tracking policy. It should outline the business reasons for using GPS tracking, when and how employees should expect to be monitored and how the employer will use and safeguard data collected. If an employee will be disciplined for disabling a GPS device without the employer’s permission, the GPS tracking policy should also notify the employees of those consequences in advance. Be sure to communicate the policy to all employees, and ask that employees acknowledge their receipt and understanding of the policy.
- Finally, be responsible and considerate. Only monitor employee activity during work hours, and only monitor the employees’ location for a specific business purpose in compliance with your GPS tracking policy. Finally, make sure that you store any GPS-related data securely.

Employers have greater access to their employees today than ever before. While there are many legitimate business reasons that an employer may wish to monitor employees through GPS technology, companies are encouraged to take steps to ensure that GPS monitoring activities do not violate applicable laws or employees’ trust.