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Employers' Use Of GPS Tracking Devices

The use of GPS tracking devices in company vehicles and cellular telephones is becoming increasingly prevalent. GPS devices can record and display location and movement to establish a history which an employer may access at any time. Currently, there are no federal or state statutes expressly prohibiting the use of GPS devices in an employment situation, but state privacy statutes and common law tort principles may be sources of legal actions by employees. One of the first cases involving an employee's challenge to the use of a GPS device is *Elgin v. St. Louis Coca-Cola Bottling Co*, 4:05 CV 970 (E.D. Mo. Nov. 14, 2005). During an investigation of theft, an employer had installed GPS devices in a number of company vans which employees were permitted to drive during working and non-working hours. One of the employees, who had been cleared of wrongdoing, sued the employer for, among other things, intrusion of seclusion. The court found the use of the GPS tracking device did not constitute a substantial intrusion upon the employee's seclusion because "it revealed no more than highly public information as to the van's location," and because the van was the employer's property, "its use of the tracking device on its own vehicle [did] not rise to the level of being highly offensive to a reasonable person."

The how and why for which tracking devices are used may spell trouble for an employer under state and federal labor laws. Two years ago, in Modesto, California, a city union president who had a GPS tracking device placed on his city truck, filed a complaint with the state labor board alleging the city violated labor laws. Although the union attorney representing the union president acknowledged that public employees should not expect a right to privacy while working in city vehicles, he claimed the monitoring was directed at gathering information on his union activities. Similarly, in an NLRB General Counsel Advice Memorandum, Case 22-CA-25324, Feb. 26, 2003, the General Counsel agreed with the finding of the Regional Office that a non-union employer had violated the NLRA by interfering with its employees' labor rights when it installed GPS units in trucks of two employees who were known union organizers. The Counsel reasoned that the employees were subjected to increased scrutiny without a legitimate business justification as the GPS units had been placed in only those two vehicles out of the eight company owned vehicles. The GPS units tracked the two employees' movements, even during non-working hours, and would have shown whether they went to a common location or visited the homes of other employees.

Employers should be wary regarding various state privacy protections. Most states have laws restricting employers from taking action against employees because of their

private off-duty pursuits. New York State, for example, has one of the most stringent laws concerning protection of legal off-duty activities, making it unlawful for employers to discriminate against individuals regarding terms or conditions of employment because of political activities, use of legal consumable products, recreational activities, and more. It may be more prudent for employers to limit GPS surveillance to on-duty activities and to inform employees that they may be monitored, since the key to the issue of privacy is typically whether an employee had a "reasonable expectation" of privacy. For example, monitoring could be limited to legitimate business reasons to increase productivity, aid in quick response, and routing organization and promptness. Employees should be able to shut down monitors during meal breaks and other off-the-clock time. In addition, any information provided by tracking devices should be limited in scope to those on a need-to-know basis. Employers should provide a written policy summarizing these points and others, such as, reserving the right to monitor the location of employees during working hours for business purposes, the right to discipline employees based on location monitoring, and the method and length of storage and safekeeping of data collected.

Be Careful Out There!

(Footnotes)

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