Looking Over Your Employees' Shoulders

Insights
4.01.15

As shifting privacy lines allow employers to reach further and further into employee conduct, it's increasingly important that you know the legal limits. Many employees will question the legality of increased employer monitoring of offsite conduct, especially when employees are off-duty.

Such monitoring may include the use of Global Positioning System (GPS) tracking and video surveillance. It could include reprimanding employees for things like speeding tickets. These practices are within an employer's legal rights – usually – but managers need to be aware of what is and is not permissible from a legal perspective.

Monitoring On The Clock

One of the most debated employee monitoring practices involves GPS tracking of company-owned and personal automobiles and cell phones. GPS tracking is often used by employers to monitor employee travel routes and to verify that work time is being effectively used and accurately recorded on time sheets. Employers sometimes suspect that their employees are being less productive than they should, maybe with good reason. According to a 2013 online survey by salary.com, 69% of U.S. workers who were polled said that they waste time every day when they are supposed to be working.

But don't put a GPS program into motion before considering potential pitfalls. When adopting such a program, you should be able to demonstrate that there is a legitimate business rationale behind the decision, such as:

- trying to improve response time and efficiency of routes;
- maintaining accurate timekeeping records; or
- increasing safety or productivity and helping to prevent theft.

While a legitimate reason is a good start, more is certainly required. You should also be sure to understand relevant state laws. For example, Texas allows employers to monitor GPS systems in any company-issued vehicle or cell phone. But, if employers want to monitor employee-owned vehicles, they must first obtain permission from the employee. We recommend that you provide clear notice to employees before implementing GPS tracking in order to avoid privacy (and other) lawsuits. One important practice is to implement and promulgate a policy stating that there should be no expectation of privacy when using company-owned equipment or vehicles.

Moreover, whether monitoring company-owned property or even employee-owned equipment that is used for work, you should limit GPS monitoring to work hours and activities. Otherwise, you might inadvertently gain access to private information, such as facts concerning medical appointments or other purely personal activities. This could obviously create problems with respect to the Americans with Disabilities Act, among other laws.

Going beyond utilization of GPS systems, some employers have installed dash cameras in each of their company-owned vehicles. While some people might view this as overly intrusive, this practice may nonetheless be reasonable to combat "distracted driving." According to a 2013 study by Virginia Tech Transportation Institute, those engaging in texting, talking on the phone, or similar distractions while driving are three times more likely to be involved in a vehicular accident.

In 2010, the Occupational Safety and Health Administration (OSHA) issued a letter to all employers stating that it is their "responsibility and legal obligation to create and maintain a safe and healthful workplace, and that would include having a clear, unequivocal and enforced policy against the hazard of texting while driving." OSHA goes on to say that any company that requires or encourages employees to text while driving is in clear violation of the Occupational Safety and Health Act.

OSHA accordingly urges employers to create and enforce policies that prevent distracted driving. Employers are able to enforce these policies while employees are on the clock, and also when employees are engaging in any work-related activity, such as talking to supervisors or clients, regardless of when that activity occurs.

Monitoring Off The Clock

Policies allowing employers to monitor employees outside of their customary work locations raise questions as to how far you may go – or should go – when monitoring off-duty activity.

Consider this: may an employer punish an off-duty employee who receives a speeding ticket while dropping off a child at soccer practice? The answer is probably yes. Does it matter if it was in the employee's personal car? No, in most cases it does not. In fact, some companies have a policy stating that employees who use a car in the course of and scope of employment must report all moving violations to a supervisor. Some such policies even provide that if an employee receives three or more moving violations in three years, the employee may face termination.

Lawful Off-Duty Conduct Laws

Before implementing policies that may affect off-duty conduct, you need to review state and federal laws. Some states have laws that protect broad categories of off-duty conduct, or require that an employer demonstrate a connection between the employee's participation in an activity and the employer's business before allowing adverse action against the employee for engaging in that conduct.

For example, in Colorado, it is illegal for an employer to terminate an employee because that employee engaged in any lawful activity off premises during nonworking hours, *unless* the

employee engaged in any lawful activity off premises during nonworking hours *unless* the restriction: 1) relates to a bona fide occupational requirement or is reasonably and rationally related to the employee's employment activities and responsibilities; or 2) is necessary to avoid or prevent the appearance of a conflict of interest with any of the employee's responsibilities to the employer.

In Montana, employers are prohibited from refusing to hire job applicants or disciplining or discharging an employee for using "lawful consumable products" (such as tobacco or alcohol) *if* the products are used away from the employer's premises outside of work hours, with certain exceptions for bona fide occupational requirements or a conflict of interest, similar to those covered by Colorado's law.

In total, 31 states have some sort of off-duty conduct law. You need to tailor your monitoring practices to comply with these state laws.

Certain off-duty employee conduct, such as social media posts, may also be protected under federal laws. As many employers have learned the hard way, the National Labor Relations Board (NLRB) restricts an employer's right to terminate an employee for posting disparaging comments on social media. You can also violate NLRB rules by maintaining overbroad social media policies if they prevent employees from discussing their wages or other conditions of employment.

While you can and probably should impose some restrictions or guidelines regarding employees' social media activities, policies regarding such restrictions must be worded carefully. For example, a company may prohibit employees from disclosing trade secrets and other legitimately confidential information on-line. You may also prohibit employees from appearing to make unauthorized statements on behalf of the company. You can certainly ban sexually or racially harassing comments, or other conduct that would be illegal in the workplace.

But in doing so carefully choose language that could not reasonably be construed to chill employees' rights to comment on the terms and conditions of their employment. This is a tricky area of the law and the NLRB has already demonstrated that it will not hesitate to challenge employer policies that it believes go too far. So it is particularly important to address these issues thoughtfully.

Use Care When Pushing The Boundaries

For employers who believe they have hit a roadblock when designing policies that reach beyond the working time, talk with an experienced labor and employment attorney. It will be time well spent. Being the test case for overbroad or impermissible employee-monitoring policies is not.

For more information or guidance in creating an employee monitoring program, contact the authors at MAbcarian@fisherphillips.com 214.220.9100 or KTroutman@fisherphillips.com 713.292.0150.

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