



Managed By Robots: Dystopian Fate Or Utopian Fantasy?

Insights

9.02.19

These days, technology occupies nearly every part of our lives. There is an app for everything, and we can order virtually anything we want on demand and have it arrive on our doorstep nearly immediately. We want things, we want them now, and we want them without having to put much thought into the automated process that led us there.

But what if this technology were used in the workplace behind the scenes, in an effort to make employees more efficient with fewer mistakes? What if the technology and robotic monotony that make one- and two-click purchasing so efficient was also turned to the human employees behind the scenes, making what is already a streamlined process even more efficient? Taking this one step further, what if employers required employees to wear wristbands or other tech devices that tracked every move they made, vibrated every time the employee was doing something “wrong,” and provided supervisors with data showing employee movement and periods of rest?

Such a scenario could become a reality for Amazon warehouse workers worldwide. The company has secured two patents for such a wristband, although it remains unclear if it actually plans to manufacture and utilize this device. In theory, this proposed technology would emit ultrasonic sound pulses and radio transmissions to track where employees hands are in relation to inventory bins, and provide feedback to steer the worker to the correct bin. The goal is to streamline time-consuming, mundane tasks, rendering what is already monotonous into downright robotic. Theoretically, with guidance from the wristband, workers could fill orders faster and get “buzzed” to keep them on track.

This wristband would not only aid workers and measure their “productivity,” but would issue warnings for those who lag and go so far as to fire those who are consistently “behind.” The possibility that this technology will be implemented by employers is sparking an epic debate over efficiency, privacy, employment law concerns, and employee morale.

Unsurprisingly, Amazon isn’t the only company turning modern technology into “robotic managers.” A company in London is developing artificial intelligence systems to highlight “unusual” work behavior. Another uses a messaging application to track employees. A Wisconsin company even offered employees the chance to be microchipped in order to use its services seamlessly. This new technology can only be described as “1984” meets “The Handmaid’s Tale” meets “Big Brother.” Sometimes, real life truly *is* stranger than fiction.

While technology certainly makes our lives easier, and it is a very natural segue to look to utilizing this technology in the workplace, employers still need to balance this out with potential employment law issues.

Disability Discrimination

One major concern about efficiency-based technology such as tracking wristbands is disability discrimination. The law prohibits employers from taking an adverse action against an employee based on their disability, and requires you to reasonably accommodate such disabilities. One example of such accommodation might be extra breaks. However, if employers are looking solely at wristband data and disciplining workers for taking more breaks than others without having the full picture or necessary context, they are at risk for a disability discrimination suit. In other words, what may seem like a justifiable action based solely on electronic feedback may, in fact, be unreasonable when considering the specific circumstances of any given employee.

Another related accommodation might be the use of other tools or products to help employees perform their job, which could cause employees to take a bit longer to complete certain tasks. Again, if employers look solely at wristband data showing an employee takes longer to complete certain tasks when compared to their non-disabled peers, and disciplines them accordingly, there is risk.

Meal And Rest Breaks

Another unknown is how such technology might affect employee meal and rest breaks. Does the wristband alert and track employee breaks? Do employees still need to clock out and back in? If wristbands obviate the need for traditional timekeeping methods, when is the alert signaled—at the start of the break, or a few minutes prior? And when does the end of break alert signal—at the very end of the break, or a few minutes before? Will it buzz and penalize employees for taking a longer break if there is a legitimate reason for doing so, related to an accommodation of which the automated process is not aware?

Off-the-clock claims (instances in which employees allege they have performed work or an employment-related function while not recording their time) have surged in recent years, in large part due to cases like *Troester v. Starbucks*. While the federal *de minimis* doctrine relating to minimal off the clock work largely still stands, cases like the California Supreme Court's decision in *Troester* are threatening the *de minimis* doctrine and have employers on edge: is every second spent on the premises compensable time?

Under the *de minimis* doctrine, employers get to take a “no harm, no foul” approach to minimal off the clock work. Essentially, the argument is that it is impossible to track every single minute an employee performs any work during a workday and, conversely, employees often times are clocked in and being paid while not working. So, in the end, it all evens out and employers should not be liable for those few minutes of off the clock work not captured or paid to employees.

Leave it to California to have no sympathy for employers. The *Troester* court rejected the *de minimis* doctrine in large part because technological advances are such that employers *should* be able to

decline, in large part because technological advances are such that employers should be able to more accurately track employee on-the-clock time. Amazon's wristband is a good example of an employer potentially responding in kind to a current personnel issue with a purely technological response—the kind of response the *Troester* court seems to want. But what if your technology is wrong? Or, what if it takes employee five minutes at the start of the day to get to work, navigate through the warehouse, and put the wristband on before employee time is clocked? Such scenarios open employers up to potentially substantial wage and hour liability.

Privacy Concerns

Employee privacy is another undeniable issue created by efficiency-based technology. Employees typically do not have a reasonable expectation of privacy when utilizing employer technology while at work, especially if they are given prior notice. But employers also typically are not allowed to “record” employees 24/7.

For example, employers typically are not allowed to surveil employee restrooms, locker rooms, or changing rooms. So, would employees using efficiency-based wristband technology be required to wear the band in those locations? If so, does that violate employee privacy laws?

Employee Morale

Employee morale is certainly something else to consider when utilizing efficiency-based technology at work. Some employees say it is bad for morale. First, these critics claim that workers face strenuous working conditions where employees are pressured to hit their alleged unreasonable “robotic” productivity goals or risk losing their job. As an added punch, workers would be tracked robotically without regard to human input or factors not reasonably susceptible to automated interpretation, thereby rendering the worker or employee automatically in the “wrong.”

Second, others claim they are monitored and supervised by unforgiving robots, not people. For example, one employee claims that Amazon's system tracks “time off task” (TOT) such that, if workers break for too long, the system generates a warning. Eventually, the employee could be fired to too much TOT. Some workers have stated that they avoid bathroom breaks to keep in line with expectations.

While a strict efficiency-based approach eases the administrative burden for employers, that approach lacks the human element. Metrics like TOT may fail to take into account that an employee is feeling sick, or is pregnant, or is disabled.

Takeaways

As technology continues to evolve, employers will be tempted to jump on board with utilizing the latest-and-greatest to ease administrative and management burdens. And employers are not wrong to want to utilize the latest technology at work, because streamlined efficiency can have a major impact on your bottom line. But the human element will always be important at work. A workplace that incorporates technology with a human approach is likely to strike the right balance between making employees feel valued and streamlining its processes. Happy employees who feel valued and heard will be far less likely to sue their employers.

and heard that he had been asked to sue their employer.

As technology continues to evolve, so too will employment laws. Employers that track such developments will be able to identify any potential risk and react accordingly. Fisher Phillips' legal alert tracking system—an automatic reminder of humanistic workplace issues—is one easy way to do so.

For more information, contact the authors at MWatkins@fisherphillips.com (858.597.9624) or SZimmerman@fisherphillips.com (949.798.2144).