

Insights, News & Events

MONITORING EMPLOYEES: HOW FAR CAN EMPLOYERS GO?

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As shifting privacy lines allow employers to reach further and further into employee conduct, it is increasingly important for employers to know their legal limits. Many employees will question the legality of increased employer monitoring of off-site conduct, especially when employees are off-duty. Such monitoring may include the use of Global Positioning System tracking and video surveillance as well as reprimanding employees for things like speeding tickets. These practices may be within employers' legal rights, 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 cellphones. GPS tracking is often used by employers to monitor employee travel routes and to verify that work time is being accurately recorded. Employers sometimes suspect their employees are being less productive than they should, and this may be with good reason. According to a 2013 online survey by salary.com, 69 percent of U.S. workers polled said they waste time everyday when they are supposed to be working.

However, employers should not put GPS programs into motion before taking note of potential pitfalls. When adopting such programs, employers should be able to demonstrate there is a legitimate business rationale behind the decision, such as:

- trying to improve response time and efficiency of routes;

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Michael V. Abcarian

Senior Counsel

214.220.8300

- maintaining accurate timekeeping records; and
- increasing safety and/or productivity and helping to prevent theft.

While this is a good start, there is certainly more required. Employers should also be sure they understand relevant state laws. For example, Texas allows employers to monitor GPS systems in any company-issued vehicle or cellphone. But, if employers wish to monitor employee-owned vehicles, they must first receive permission from the employee. It is recommended that employers provide clear notice to employees before implementing GPS tracking in order to avoid privacy (and other) lawsuits. One important practice is to implement a policy stating that there should be no expectation of privacy when using company-owned equipment and/or vehicles.

Moreover, whether monitoring company-owned property or even employee-owned equipment that is used for work, employers should limit GPS monitoring to work hours and activities. Otherwise, they could potentially gain access to private information, such as facts concerning medical appointments or other purely personal activities.

Going beyond using GPS systems, Conway Services Heating, Cooling & Plumbing installed dash cameras in each of its company-owned vehicles. While some people might view this as overly intrusive, this practice may nonetheless be reasonable to combat "distracted driving." Those engaging in texting, talking on the phone or similar distractions while driving are, according to a 2013 study conducted by Virginia Tech Transportation Institute, three times more likely to be involved in a vehicular accident.

In 2010, the U.S. Occupational Safety and Health Administration 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 requiring or encouraging employees to text while driving is in clear violation of the Occupational Safety and Health Act. Accordingly, OSHA 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 activity, such as talking to supervisors or clients, despite the time.

Monitoring Off the Clock

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

Consider this: Can an off-duty employee who receives a speeding ticket while dropping off her child at soccer practice be punished by her employer? The answer is yes. Does it matter if she is in her personal car? No, it does not. In fact, AT&T Inc. has a policy stating that employees who use a car in the course and scope of employment must report all moving violations to a supervisor. If they receive three or more moving violations in three years, they become subject to possible termination. Halliburton Co. has a similar policy.

Before implementing policies that may affect off-duty conduct, employers should review state and federal laws. Some states have laws that protect broad categories of off-duty conduct, or require that an employer demonstrate there is a connection between the employee's engagement in an activity and the employer's business before allowing the employer to take 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 the employer's 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, disciplining employees, or discharging employees 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.

Texas, unlike 31 other states, does not currently have any off-duty conduct laws. For now, Texas employers need only comply with federal law. In addition to commonly known federal protections, off-duty social media use may be protected. As many employers have learned the hard way, the National Labor Relations Board may restrict an employer's right to terminate an employee for posting disparaging comments on social media. Employers also may violate NLRB rules by maintaining overbroad social media policies if they may prevent employees from discussing their wages or other conditions of employment.

For employers who believe they have hit a roadblock when designing policies that reach beyond the working time, consultation with an experienced labor and employment attorney may be a wise strategy. Being the test case for overbroad or impermissible employee monitoring policies may prove to be an expensive walk in the park.

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