



## Company Offers Employees Implanted Microchips

Insights

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In August 2017, Wisconsin technology company, 3 Square Market, may have been the first U.S. company to offer employees the ability to have radio frequency identification device (“RFID”) chips implanted under their skin. The chips, the size of a grain of rice, are injected between the employee’s thumb and index finger. After that, employees can swipe their hands over chip readers to get into the office building, purchase food in the cafeteria and potentially log onto computer and other systems. For now, the chips are voluntary, and numerous employees have signed up to have them implanted.

Relying on chip technology for employees raises a multitude of privacy concerns. Although 3 Square Market is using the chips for limited purposes, there is the potential for broader uses and unintended consequences. In the future, could employers utilize chips to track employee whereabouts, including after hours? Could they determine how long employees’ breaks are and discipline employees for staying away too long? Will these uses lead to employee litigation and employer liability for invasion of privacy? Additionally, privacy concerns could arise depending on the data embedded on the chips. Eventually, health information could be loaded onto chips to allow people to easily convey health information to their physicians. Could an employer access that data, intentionally or by accident?

And there is also the concern of many employees about the implantation of the chip itself. Is it painful? Is it safe? Could it degrade or migrate under the skin? Employees may also have religious or moral objections to the injection of the chip. The 4th Circuit U.S. Court of Appeals recently upheld a jury verdict of \$600,000 in the case of an employee who was required to use a biometric hand scanner and refused to do so based on his religious belief that the technology amounted to the “mark of the beast” from the Bible’s Book of Revelation. Undoubtedly, similar objections will arise to the use of chip technology.

For now there is no federal law governing employee chip implantation. However, states have already gotten into the act to regulate employers’ reliance on chip technology. As of this writing, the following states prohibit employers from requiring employees to have chips implanted: California, Missouri, North Dakota, Oklahoma and Wisconsin. For example, California’s law provides that no one may “require, coerce, or compel any other individual to undergo the subcutaneous implanting of an identification device.” Cal. Civ. Code 52.7. An identification device is any “item, application, or product that is passively or actively capable of transmitting personal information, including, but not

limited to, devices using radio frequency technology.” The law gives employees a private cause of action for actual, compensatory and punitive damages.

Chip technology may be the wave of the future. However, privacy concerns will certainly develop that the courts will need to hash out. Also, more and more states are regulating chip usage. At a minimum, employers who offer the technology must be certain that it is completely voluntary and do nothing that would appear to “coerce” or urge employees in any way to use it. Employers should obtain written consent for the implantation of the device and may want to consider a waiver for any health effects. And employers should consult state law before offering the technology and stay abreast of developments as the courts consider the complex privacy considerations that may arise.