

TRACKING EMPLOYEES

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The rapid-fire advancement of computer technology and the availability of new equipment in the marketplace forces today's employers to walk a privacy tightrope. Because employers are able to monitor the whereabouts, conduct, writing and behavior of their employees, the question then becomes, how far may the employer travel along this path before it unnecessarily or inappropriately has invaded its employees' right to privacy?

With wireless access, enhanced cell phone functions and personal digital assistants, the issue arises of whether a company can monitor the location of its employees lawfully by using global positioning system tracking capabilities present in company cell phones and BlackBerry or other PDA devices. Assuming the company can do so, when and where can it do so without violating its employees' rights of privacy?

GPS Technology

Employers can use cell phones and BlackBerry devices to determine the whereabouts of their employees. GPS technology, originally developed by the military in the 1970s, uses a network of orbiting satellites to pinpoint the location of a vehicle or a person within 15 feet. By late 2005, the federal Wireless Communication and Public Safety Act of 1999 required that all cell phones use GPS technology to help emergency crews respond to 911 calls. Thus, most employer-issued cell phones and BlackBerry devices purchased within the past two years allow employers to track where their employees are geographically located at any given time.

Employees may, in turn, take affirmative steps to prevent their GPS devices from working properly. When a cell phone is turned off, for example, the location data (also known as "waypoints") cannot be collected, thereby preventing GPS tracking.

Employees also may damage their cell phones or PDAs by removing or disabling the memory chip or installing a GPS jammer, which feeds its output directly into a phone's

receiving antenna or its immediate vicinity to jam only the specific phone in question, preventing tracking of the phone's waypoints.

Invading Privacy

Studies have shown that using GPS tracking devices in employer-provided cell phones has increased employee productivity immediately. Despite this obvious benefit to employers, employees often view GPS tracking as a serious threat to employee privacy, thus undercutting any sense of trust between the employer and the employee.

Although no federal law prohibits an employer's use of GPS technology to track an employee's location, employees may seek protection from GPS tracking under state privacy laws. In California, an employee could challenge GPS tracking by asserting a cause of action for invasion of privacy under Article I, Section 1 of the California Constitution. *Hill v. National Collegiate Athletic Association*, 7 Cal.4th 1 (1994).

California recognizes two categories of privacy interests: (1) the dissemination or misuse of sensitive and confidential information; and (2) the ability to make intimate personal decisions or conduct personal activities without observation, intrusion or interference.

An employer has invaded an employee's privacy rights if the employee had a reasonable expectation of privacy for the interest invaded. Whether an employee has a "reasonable expectation of privacy" is measured objectively based on widely accepted community norms, including the customs of the time and place, the occupation of the employee, the habits of his or her fellow citizens and whether the employee voluntarily consented to the employer's actions.

An employee's continued use of company-provided equipment with full knowledge of the employer's intent to monitor the employee through such equipment demonstrates consent to the employer's actions. The reasonableness of an employee's privacy expectation regarding his or her location at any given time, therefore, depends on whether the employee knew that the employer would track the employee's whereabouts by using GPS technology in employer-issued cell phones and BlackBerry devices.

Eliminating Expectations

Employees' reasonable expectations of privacy may be reduced or eliminated in the workplace if the employer distributes clear written policies notifying employees of the various methods the employer can and will use to collect information about the employee's conduct. A California employer is obligated to inform its employees that it conducts video surveillance at the workplace, that it reviews Internet use data or that it can access and view e-mail, voice mail or telephone calls. Similarly, the employer should notify its employees that it reserves the right to monitor and use data gathered from company-provided cell phones and PDAs containing GPS technology.

"Employers can diminish an individual employee's expectation of privacy by clearly stating in the policy that the electronic communications are to be used solely for company business, and that the company reserves the right to monitor or access all employee Internet or e-mail usage." *TBG Insurance Services Corp. v. Super. Ct. of Los Angeles County*, 96 Cal.App.4th 443 (2002).

In *TBG*, a former employee claimed that he had a reasonable expectation of privacy in a home computer provided by his employer, despite the fact that he agreed in writing to the employer's computer monitoring policy. The court disagreed, because the employer gave the employee advance notice of its computer monitoring policy and gave the employee the opportunity to consent to or reject the policy.

As with computer monitoring policies, written policies outlining an employer's GPS tracking practices will deter employee privacy claims. Consider an employer's written policy that requires all employees to keep their employer-issued cell phones or BlackBerry devices on and carry them with them to be reachable during regular work hours. If the policy also requires that employees keep the GPS technology enabled during regular work hours and reserves the right to use this technology to monitor employee activities during those times, employees have no legitimate claim of privacy for their whereabouts.

However, an employer's monitoring of an employee's whereabouts during nonworking hours likely would not be a justifiable invasion of privacy. In California, an employee may bring an action for invasion of privacy by showing that the employer intruded into a private place, conversation or matter in



a manner highly offensive to a reasonable person, such as by obtaining unwanted access to data about which the employee had a reasonable expectation of privacy. *Shulman v. Group W Productions Inc.* 18 Cal.4th 200 (1998).

The employer might argue that it is entitled to track the GPS data on a company-issued cell phone or PDA at any time, because the equipment belongs to the employer. However, an employee probably would have a reasonable expectation of privacy regarding lawful off-duty conduct or during off-duty hours, and any tracking of activities or whereabouts during off-duty hours would be an unreasonable invasion of privacy rights.

Amending Handbooks

Because employers can diminish an employee's reasonable expectations of privacy by developing a clear and detailed GPS tracking policy, employers should amend their handbooks to include such policies. Specifically, employers who provide company cell phones or PDAs to employees should state clearly in their employment policies that (1) the company reserves the right to monitor the geographic location of its employees

during working hours (including a specific description of the days and times that GPS tracking may be monitored), (2) employees may not disable or otherwise interfere with the GPS (or any other) functions on a company-issued cell phone or PDA device, (3) employees may use company-issued cell phones and PDAs for business purposes and not for personal use, and (4) employees should have no expectation of privacy for their physical location during the specified working hours (or in any other data stored or available on the company-provided cell phone or PDA at any time).

By making clear to employees that the employer can and will track GPS data to monitor employee whereabouts, employees who continue to use the company-provided cell phone or PDA device have no reasonable expectation of privacy for the data collected from such equipment and may not object to the employer's use of that data for review, disciplinary or termination purposes.

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