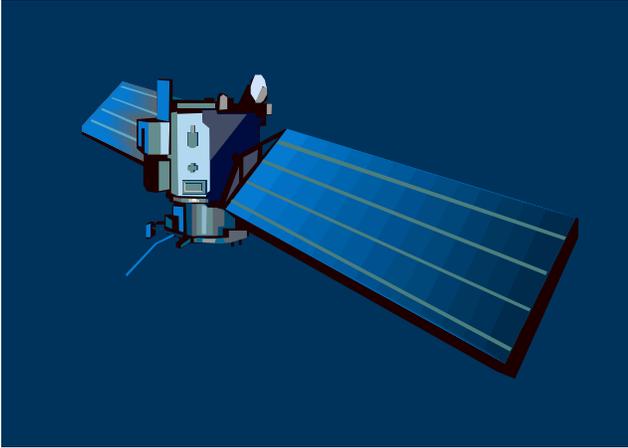

LABOR AND EMPLOYMENT LAW UPDATE



NOWHERE TO HIDE: GPS TRACKING OF MOBILE EMPLOYEES

America's workforce is becoming increasingly mobile. Historically, the mobile workforce consisted of drivers, couriers, sales representatives, security patrol officers, field technicians and similar occupations. Thanks to wireless and portable information systems, traditional desk jobs have now become mobile as well. One study has predicted that, by 2009, as many as 70% of the workers in the U.S. will have some element of mobility in their job.

Increased mobility presents unique challenges for employers concerned with employee productivity, work hours, conduct and injuries away from work and the security of company property entrusted to employees. To meet these challenges, many employers are turning to global positioning system or "GPS" technology. Such technology enables an employer to remotely track an employee's location, speed and direction, at any given time, through a GPS receiver installed in a vehicle or portable device, such as a laptop computer, PDA or cell phone, in the employee's possession.

News stories abound of employees being caught by GPS tracking in prolonged breaks, extra marital affairs and illegal activities during work hours. Employers who may be intrigued by such stories would do well, however, to consider and address the legal risks associated with GPS tracking before implementing a surveillance program.

INVASION OF PRIVACY CLAIMS: There may be times when an employee has a reasonable expectation that his whereabouts and activities are private from others, including his employer. State privacy laws may be implicated where an employer intrudes upon such privacy through GPS tracking.

EXAMPLE: A sales representative periodically attends Alcoholics Anonymous meetings during his lunch break and after work hours. He does not disclose his attendance at these meetings to his employer or his co-workers. Through GPS monitoring of a company vehicle provided to the sales representative, the employer learns that he is attending Alcoholic Anonymous meetings and is thus an alcoholic. Such discovery may make the employer susceptible to a claim for invasion of privacy.

Consent is generally an absolute defense to a claim of invasion of privacy. An employer, however, still must prove that the employee consented to GPS tracking at the time and place alleged to have been an invasion of privacy.

NEGLIGENT SUPERVISION CLAIMS: The continued employment of an employee whom an employer knew or should have known presented an unreasonable risk of harm to others can be the basis for a negligent supervision claim by a person harmed by the employee's conduct. In such cases, GPS tracking data can be evidence of what the employer knew or should have known.

EXAMPLE: A commercial truck driver is prone to speeding and exceeding the maximum service hours prescribed by law. Such behavior is reflected in GPS tracking data maintained by the employer. If the driver is retained by the employer and is later involved in a traffic accident caused by speeding or prolonged service hours, the employer could be vulnerable to a claim of negligent supervision.

GPS tracking may thus actually create a legal responsibility to act upon information which has been or can be discovered by an employer through such monitoring.

DISCRIMINATION CLAIMS: Membership by an employee in a group protected by federal and state employment discrimination laws may not always be readily apparent. In such situations, evidence that an employer knew that an employee was a member of such a group is generally required to support a claim of discrimination. GPS tracking may provide evidence of such knowledge.

EXAMPLE: An HIV positive courier periodically visits an AIDS clinic during work hours for treatment. The employee does not disclose his medical condition or his clinic visits to his employer. GPS tracking data regarding the employee's laptop computer nevertheless reveals the employee's secret. If the employee subsequently files a claim of disability discrimination, the employer will likely not be able to escape potential liability by denying knowledge of the employee's HIV status.

CLAIMS BASED UPON INACCURATE DATA: Accuracy is still a significant issue in GPS monitoring. An employer who bases an employment decision solely upon GPS data may be doing so based upon inaccurate information, thereby subjecting him to potential liability for such claims as defamation, wrongful discharge, and employment discrimination.

EXAMPLE: A pharmaceutical sales representative parks his company car at an office building to meet his accountant who has an office in the building. GPS tracking data incorrectly places the company car in a building next door where a competing pharmaceutical company maintains an office. The employer jumps to the conclusion that the employee is interviewing for another job with the competitor. Any employment decision based upon this assumption will be flawed and thus vulnerable to legal claims.

RECOMMENDATIONS FOR EMPLOYERS: For employers who elect to implement a GPS tracking system despite these legal risks, several recommendations should be considered:

- ☐ GPS monitoring should be limited to company-owned property; it is easier for an employee to claim a reasonable expectation of privacy while in possession of property which belongs to him.

- ☐ Comprehensive written policies and procedures should be adopted and enforced which limit the legal risk assumed by the employer with GPS tracking.

ADDITIONAL QUESTIONS? If you have any questions regarding the evaluation or implementation of a GPS monitoring program or any other labor and employment law matter, please contact Robert Chadwick at Campbell & Chadwick, P.C.

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