

The GPS Dilemma: Keeping Tabs on Employees by Marlene S. Garvis and Vicki A. Hruby

What Is The Issue? In today's workplace, employers often provide employees with laptops, smart phones, and company cars. Concern about the use of these electronics and whether employees are confining their use to work-related activities has caused employers to consider ways of keeping an eye on employees on-the-job. As a result, many are choosing to monitor employees using a Global Positioning System (GPS).

Neither federal law nor Minnesota state law prohibits the use of GPS to monitor employees and, to date, the use of GPS has not been successfully challenged in Minnesota. However, there is concern that the use of GPS in the workplace setting may invade an employee's privacy and/or violate an employee's federal Fourth Amendment rights.

Although Minnesota courts have not considered the use of GPS in the employee privacy or Fourth Amendment context, GPS use has been addressed in the unemployment context to establish employee misconduct, e.g., *Loud v. Transit Team, Inc.*, 2013 WL 6152184 (Minn. App. Nov. 25, 2013) (employee misconduct where GPS revealed employee used company vehicle for personal use in violation of policy); *Nelson v. Høglund Bus Co., Inc.*, 2013 WL 3968764 (Minn. App. Aug. 5, 2013) (employee misconduct where GPS revealed company vehicle parked outside of bar during workday); *Oliver v. Minnesota State Lottery*, 2011 WL 3795108 (Minn. App. Aug. 29, 2011) (employee misconduct where GPS established employee falsified time records).

What Should Employers Do?

Employers need to be aware of the benefits and risks of GPS monitoring. While GPS monitoring can be useful to evaluate employee productivity, efficiency, and compliance with company policies, employers need to be careful to avoid the risk of invading their employees' privacy and affecting employee morale. To achieve the most effective results, best practices for GPS use would include:

- Identifying legitimate business reasons

for GPS monitoring, e.g., monitoring speeding, procuring employee compliance with wage and hour laws including taking breaks and properly reporting time worked, ensuring company vehicles are not used for personal business;

- Establishing an electronics systems policy that notifies employees that they may be subject to GPS monitoring and that there is no expectation of privacy;
- Obtaining written acknowledgement from each employee of their understanding and consent to the use of GPS monitoring;
- Explaining to employees that GPS monitoring is important to further the company's business interests; and
- Developing a method to store the data collected from GPS monitors, focusing on data that impacts or interferes with employee job performance.

What's In The Future?

Overall, it appears that the use of GPS or similar electronic monitoring of employees will continue to grow, so employers need to keep

abreast of the developments in this area. •

Five Things for Employers to Do this Year

by Jessica E. Schwie

1. Remove any questions about criminal

Five Things continued on Page 2

Short Shots

GINA: EMPLOYER REQUESTS FOR HEALTH-RELATED INFORMATION

Alert: The EEOC Final Rule on the use of genetic information recommends that employer compliance with Title II of the Genetic Information Non-discrimination Act (GINA) includes the need to warn the employee and/or health care provider from whom the employer requests health information to **not** provide any genetic information about the employee.

Firm News



Elisa M. Hatlevig has been named a Partner in the Firm effective January 1, 2014.

Industry News

Just in from BLS: Employer costs for wages and salaries averaged \$21.54 per hour worked in 2013, while benefits averaged \$9.61.

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background from job applications.

The EEOC issued guidelines and many states, including Minnesota, have taken action to discourage employers from using arrest and conviction records in making hiring decisions. Reading the EEOC guidelines together with the state laws, we recommend that you remove any criminal history questions from your employment application(s). If knowing the person's criminal history is needed for the position (e.g. the person will be alone with children), ask the employee for an authorization to conduct a check *after* offering employment contingent upon successfully passing a background check.

2. Compare job descriptions of employees to their actual duties.

It is relatively common for employees to shift duties over the course of time such that an employee who was previously properly designated as an exempt employee may no longer be, rendering the employer in violation of wage and hour laws. Second, review often helps to minimize disputes between supervisors and employees as to whether an employee is actually performing his/her job satisfactorily. Finally, the actual duties of a person and whether those duties are essential is critical information to determining how to address situations of illness, injury, or disability and need for accommodation.

3. Review social media posts of an employee in limited circumstances.

Social media can contain a great deal of information about an employee's (or prospective employee's) activities, including misconduct. Regulators of employers are reaching the conclusion that employers are going too far and

have begun to restrict an employer's access to, and use of, social media as a basis for making employment decisions. The upshot is:

- Review social media posts only after a conditional offer of employment.
- Only penalize posts that include discriminatory remarks, abusive and profane language, verbal, mental and physical abuse, and/or a breach of trade secrets.
- Posts that defame or disparage the employer in isolated instances, including comments that call supervisors or other officials within the company derogatory names, should be penalized only after a warning and continued conduct that creates adverse consequences in the workplace.

4. Update your employee handbook or create one, if you don't have one.

Employment policies should be updated to ensure that they address the following areas: prevention of discrimination in the workplace, not just sexual harassment; the accommodation of employees in cases of illness, injury, or disability; that genetic information of individuals will not be used to make employment decisions; and that employees will not be retaliated against for reporting perceived violations of law or discriminatory and/or harassing behavior.

5. Start a plan for complying with the Affordable Health Care Act (a/k/a Obamacare).

The deadline for compliance with many of the ACA's requirements was delayed until January 1, 2015, but employers should become familiar with their obligations and begin steps to comply because it will affect the bottom line. Top issues to resolve: "play or pay" and dental and vision

**You Don't Need a GPS
to get on track
for the New Year.**

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<http://www.recipe.com/spicy-beef-and-noodle-salad/>

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About The Authors

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