

**CO-CHAIRS, DIGITAL
WORKPLACE & DATA
PRIVACY PRACTICE
GROUP**

Susan Bassford Wilson
St. Louis, MO

Mallory Schneider Ricci
Nashville, TN

Ron Sarian
Los Angeles, CA

EDITOR IN CHIEF

Robin Shea,
Winston-Salem, NC

Susan Bassford Wilson,
St. Louis, MO

Tracking employees in the age of COVID-19

By Susan Bassford Wilson
St. Louis Office

Monitoring employees isn't a new or novel idea. Companies have long debated the merits of video surveillance in the workplace, tracking employee vehicles with GPS, or monitoring employee movements via a smartphone application. However, some employers are taking another look at employee monitoring as a means to help ensure employee safety and hinder the spread of COVID-19.

Overview of workplace monitoring laws

Federal laws governing workplace monitoring are fairly sparse. For example, the Electronic Communications Privacy Act (which amends the Wiretap Act) protects certain oral and electronic communications from unauthorized interception, use, and disclosure. The Stored Communications Act protects wire and electronic communications and records, though it doesn't apply to communications stored on a company's system if the company's policy authorizes access to those communications. GPS tracking is often contested in criminal matters because of the Fourth Amendment's prohibition on unreasonable searches or seizures. However, the Fourth Amendment applies to public employers and governmental action, not to private employers.

Instead, an employee's right to privacy is often driven by widely varying state laws. For example, many states have wiretapping laws that encompass workplace surveillance. Other states like California, Tennessee, and Texas have laws limiting an employer's ability to use GPS or other tracking devices. States such as Connecticut and Delaware prohibit monitoring employees in areas where people have a reasonable expectation of privacy, like restrooms and locker rooms. Further, in addition to statutory protections, employee monitoring can also trigger common law privacy claims like invasion of privacy and intrusion into seclusion.

Privacy rights can also vary based on the type of technology being used. Unsurprisingly, there is more regulation of older forms of technology like telephones than there is about newer options such as tracking employees via an access badge. However, the analysis concerning older forms of technology is often helpful in evaluating newer, high-tech options.

Pros and cons of monitoring or tracking employees

Monitoring employees at work requires striking a delicate balance between reasonable employee concerns and legitimate business interests. First, employers who have or are considering a monitoring program should be



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cognizant of employee privacy concerns. Monitoring employees outside the workplace can be particularly invasive because it can intrude into an employee's private life. For example, GPS tracking of a company car may reveal information about the employee's location or activities after hours. Employee tracking programs could also present opportunities for misuse by other employees. Further, monitoring could hurt employee morale. Employee monitoring may also create issues related to the National Labor Relations Act, whether or not the workplace is unionized. Overly broad surveillance could infringe on the ability to engage in protected concerted activity or create an unfair labor practice claim under the NLRA.

Employee tracking may also be an issue in class or collective actions. For example, one putative class and collective action recently filed in California alleged that, among other things, the employer tracked its company vehicles via GPS to measure the length of client visits and ensure that the cars were not driven for personal reasons. The suit specifically sought relief for a subclass of employees who purportedly had unauthorized paycheck deductions taken each month for the alleged personal use of those vehicles.

However, there are many benefits of a thoughtfully formulated employee monitoring program. In the age of COVID-19, employee monitoring could be used to ensure that employees are following the company's directions regarding social distancing. It could also be used to determine who an infected employee came into contact with for purposes of notification and to tailor decisions related to a partial facility shutdown designed to stop the spread of the infection. GPS tracking of employees could help detect when a traveling employee has been in an accident. Monitoring can help protect against or investigate allegations of employee misconduct. Tracking can also be used to increase employee productivity by highlighting the need for training or ensure the appropriate use of employer resources. Employee monitoring may be used to ensure that unauthorized individuals do not access secure rooms. Workplace surveillance can also deter employee theft, violence, and other prohibited behaviors.

Practical tips for employee monitoring or tracking

Employers that have or are contemplating employee monitoring should consider the following tips:

- **Balance employee privacy rights with legitimate business and safety concerns.** Before implementing a tracking program, employers should consider what legitimate business purpose employee monitoring serves and determine whether there is a less invasive option that would achieve the same or similar results. Further, employers should consider the scope of the monitoring, and be cautious about tracking employees who are off the clock. For example, if the primary business interests are ensuring social distancing and reducing operational bottlenecks within the facility, using a proximity badge that only tracks and reports information about an employee's location within the facility is less invasive than requiring all employees to install an app on a personal device that records and reports employee location data 24/7.
- **Create a clear and thoughtful policy.** Like so many other areas of employment law, a thoughtful policy that is compliant with applicable federal and state law is invaluable. Improperly implemented or sloppily operated monitoring or tracking programs can expose employers to a variety of legal risks. At a minimum, the policy should clearly describe the purpose of the tracking, when such monitoring will occur, and how the data will be used; identify which employees will be able to access the data; explain the terms and length of the retention of that data; and describe the consequences for misuse or unauthorized access. Further, the policy should reiterate that employees have no

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expectation of privacy when using the company's equipment or within public areas of the company's facility.

- **Know the law.** As previously mentioned, the law in this area is state-specific and changes often. Regularly review the law in all the states in which you operate to ensure that your thoughtful policy remains compliant.
- **Give employees notice and obtain advance consent.** Many states prohibit surveillance or GPS tracking without prior notice to the person being recorded or tracked. Thus, employers who implement a surveillance or tracking program should explain the program to employees in advance and provide employees with a copy of the company's policy on it. Further, written consent to monitoring is always a good idea. Not only is it required in some states, but it is also an affirmative defense to many statutory and common law claims.

Regardless of whether employee monitoring is an old program or a new idea that you are exploring due to COVID-19, now is the best time to ensure that your company's procedures and policies are useful and lawful.

Need help with reopening?
Check out our **Coronavirus Return to Work FAQs** for the latest guidance. And more general information is available on our **Coronavirus Resource Center** page.

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