



Geofencing and Geotracking: Navigating Legal and Privacy Concerns for Employers

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Introduction

The more that technology evolves, the easier it has become for employers of all sizes and across various industries to monitor their employees with tracking technology. Indeed, a 2012 study by technology research firm Aberdeen Group found that 62 percent of companies with field employees used GPS to track them. See Andrea Peterson, *Some companies are tracking workers with smartphone apps. What could possibly go wrong?*, Washington Post (May 14, 2015), available at <https://www.washingtonpost.com/news/the-switch/wp/2015/05/14/some-companies-are-tracking-workers-with-smartphone-apps-what-could-possibly-go-wrong/>. Although there are obvious benefits to using tracking technology—improved efficiency, ability to monitor hours and overtime, etc.—such a practice may also implicate privacy and other legal concerns.

Currently there are few legal restrictions on an employer's ability to use tracking technology during working time. In fact, the U.S. Supreme Court has stated, "ordinarily, an employee consents to significant restrictions in his freedom of movement where necessary for his employment, and few are free to come and go as they please during working hours." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989). However, as discussed in more detail below, legal disputes have arisen nevertheless between employees and employers, especially in cases in which the employer has used more invasive forms of "geotracking" to monitor employees.

Uses for Geofencing and Geotracking in the Construction Industry

"Geofencing" and "Geotracking" are somewhat recent terms that have arisen to describe various global positioning system (GPS) monitoring techniques. A "geofence" is a virtual boundary created by a software program using GPS or other means to define a geographical area. When employers use geofencing technology, they are simply alerted when an employee enters or exits a particular geographical boundary set by the employer. By contrast, "Geotracking" is the use of GPS to track the

real-time movements of either or both of employees and their electronic devices.

Geofencing and geotracking are used by employers in a variety of ways. For example, many use this technology to keep labor costs down by tracking employees' time and attendance remotely. Companies that have staff in the field or on client visits need more efficient ways to track their employees' time. One way to accomplish this is by developing and implementing online time tracking platforms that are connected to employees' phones. Online time and attendance software, for example, can account for an employee's time based on his or her geographic location. This technology can provide businesses an effective way to manage their workforce, improve time reporting and save on labor costs.

GPS technologies, especially geofencing, can be particularly helpful for employers in the construction industry. Applications are readily available that allow employers to set geofencing parameters, such as creating a geofence around a construction site or other worksite. Using this type of application, employers in the construction industry have a tool to better manage their payroll and timekeeping, since the software will electronically log when an employee is on-site or off-site. This allows the employer to avoid having to rely on self-reported hours and to avoid manually entering hours into the employer's timekeeping system. It also allows for more accurate and efficient timekeeping. Examples of construction-specific mobile apps that provide this service include Red-Trac and Labor Sync.

Another way that construction companies may use geofencing, in addition to monitoring the location of employees, is to monitor the location of materials and equipment left on-site. The primary benefit of such a use is to improve surveillance of the site and allow more rapid response to suspected criminal activity. If a piece of equipment is moved outside of a geofence, the company is alerted, allowing it to more quickly address issues such as theft and increase the likelihood that the item will be recovered.

However, despite the benefits for employers, these types of practices raise privacy concerns for employees. If an employer can track the location of its employees via their mobile devices, then the employer may theoretically also have access to a wide array of information that is stored on the employees' mobile devices. Theoretically, the employer may have access to ranges of information regarding its employees' whereabouts outside of working time, from the stores in which the employees shop, which doctors they go to and when, and even their sleep habits, social media interests and other private information. Businesses have an incentive to use their resources and manage their employees efficiently, but employees are rightfully concerned about their privacy and what information might end up in the hands of a third party.

Legal Considerations

Though there have not yet been any significant legal decisions related to GPS monitoring in the construction industry in particular, legal disputes have arisen nevertheless regarding privacy and employer GPS monitoring in other contexts. Many of these cases involve the use of GPS devices in employer-owned vehicles. For the most part, courts and arbitrators have found that an employer's installation of a GPS system in an employer-owned vehicle does not violate an employee's privacy right¹. For instance, in *Elgin v. St. Louis Coca-Cola Bottling Co.*, No. 4:05CV970-DJS (E.D. Mo. Nov. 14, 2005), an employer installed a GPS system in a vehicle that was assigned to an employee for the purposes of investigating cash shortages in vending machines accessible to the employee. Although the

employee ultimately was cleared of wrongdoing, when the employee discovered that a GPS had been installed on the vehicle he filed an invasion of privacy claim under state law. In considering the undisclosed use of the GPS device, the court found that there was not a substantial intrusion on the employee as the information revealed nothing more than highly public information about the van's location.

Elgin involved GPS tracking of company-owned vehicles, but other cases have addressed the issue of installing trackers on employee-owned vehicles. In *Cunningham v. New York State Dept. of Labor* (N.Y. Ct. App. Jun. 27, 2013), the highest state court in New York addressed the issue of whether a warrant must be obtained before the state may attach a GPS tracking device to one of its employees' personal vehicles. *Cunningham* was an employee of the state Department of Labor and was under investigation for falsifying time sheets. Without his knowledge, the employer attached a GPS device to his personal car, and his movements were recorded for a month. The data collected indicated that he was in fact falsifying time sheets and eleven charges were brought against him. The court held that attaching a GPS device to a public employee's car does not require a warrant, reasoning that it was only the car's location, and not the car itself or its contents, that were being monitored, and that during the time that the car was being used for work purposes the employee had no reasonable expectation of privacy.

Employers contemplating employee GPS monitoring in the construction industry may also need to consider compliance with the National Labor Relations Act (NLRA), the federal law that protects employees' union activities. Under the NLRA, employers are prohibited from engaging in surveillance of protected concerted conduct and are obligated to negotiate issues such as employee surveillance as part of collective bargaining with the union. For those employers with unionized workforces, privacy issues may be a growing concern during the collective bargaining process. Union representatives may resist arrangements granting employers broad rights regarding the use of technology for surveillance purposes and may attempt to renegotiate them, or even bring legal challenges to such arrangements. However, where the terms of the collective bargaining agreement grant wide latitude to the employer to conduct monitoring or surveillance, courts have upheld the legality of employee monitoring through GPS tracking. For instance, in *Otis Elevator Co. v. Local 1, Int'l Union of Elevator Constructors* (S.D.N.Y. Sept. 23, 2005), a union attempted to undercut an employer's installation of GPS devices in company-owned vehicles. Both the arbitrator and, subsequently, the federal court concluded that the collective bargaining agreement granted the employer broad permission in implementing and using tracking technology.

Conclusion

Despite being relatively new technologies, GPS monitoring techniques such as geofencing and geotracking are being adopted rapidly across a broad array of industries. A tremendous amount of value can be realized through the management of labor costs and monitoring for misconduct or other security concerns. However, employees may be resistant to, and may even challenge, such monitoring due to the privacy implications involved. Even if the employer is able to defend such challenges successfully, legal and collective bargaining disputes can be costly and drawn-out and can negatively affect not only employee morale, but also public relations. Employers choosing to implement a GPS monitoring policy should consider whether they can achieve their objectives with less invasive monitoring, such as geofencing, as opposed to more comprehensive GPS tracking. Regardless of how employers choose to

utilize this technology, communication and transparency are paramount to ensure privacy boundaries are respected and the technology is only being used in a purely work-related capacity. Information gathered through monitoring and/or tracking should be limited as much as possible to that information pertaining to work-related activities during working time. Employers in the construction industry should weigh these considerations carefully before implementing a geofencing or geotracking policy, especially where the employer is bound by the terms of a collective bargaining agreement with employees.

¹ See *Cunningham v. New York State Dep't of Labor*, 21 N.Y.3d 515, 523, 997 N.E.2d 468, 473 (2013); *Alexandre v. New York City Taxi & Limousine Comm'n*, No. 07 CIV. 8175 (RMB), 2007 WL 2826952, at *10 (S.D.N.Y. Sept. 28, 2007).

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