

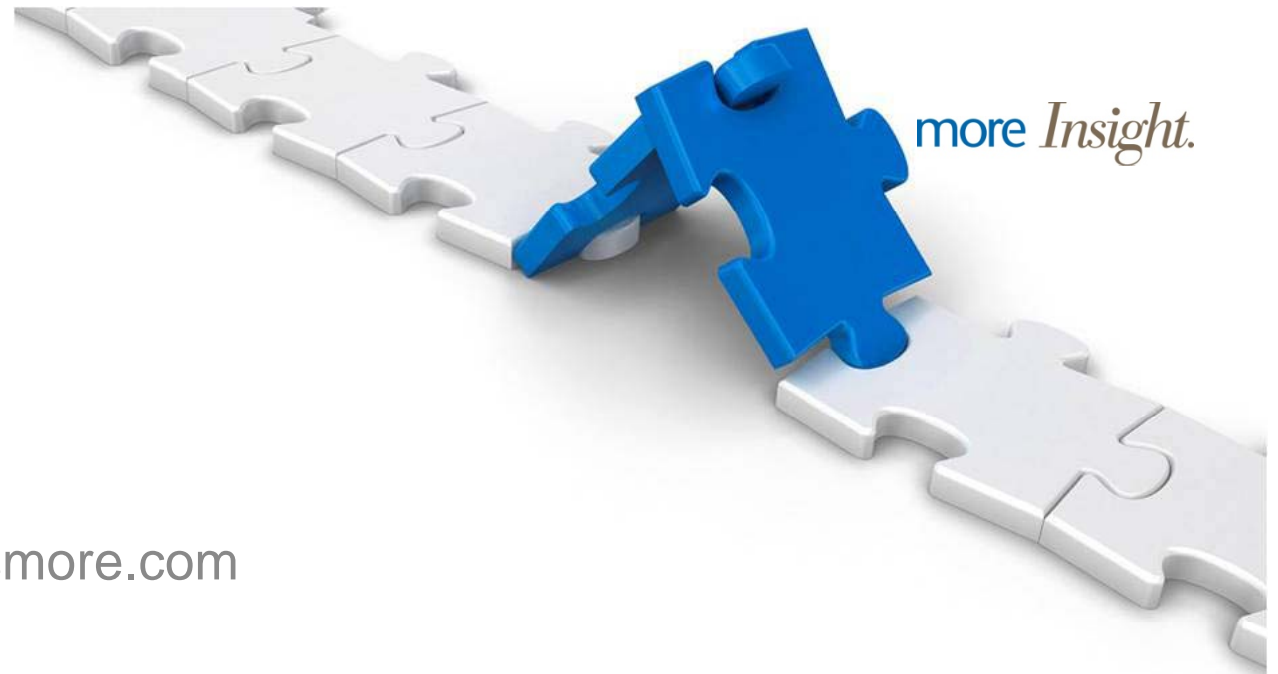


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# GPS Tracking of Employees: Balancing Employees' Right to Privacy with Employers' Right to Know

The Law, Potential Issues, and Best Practices.

By Brian J. Moore and Ashley C. Pack



## Presenters

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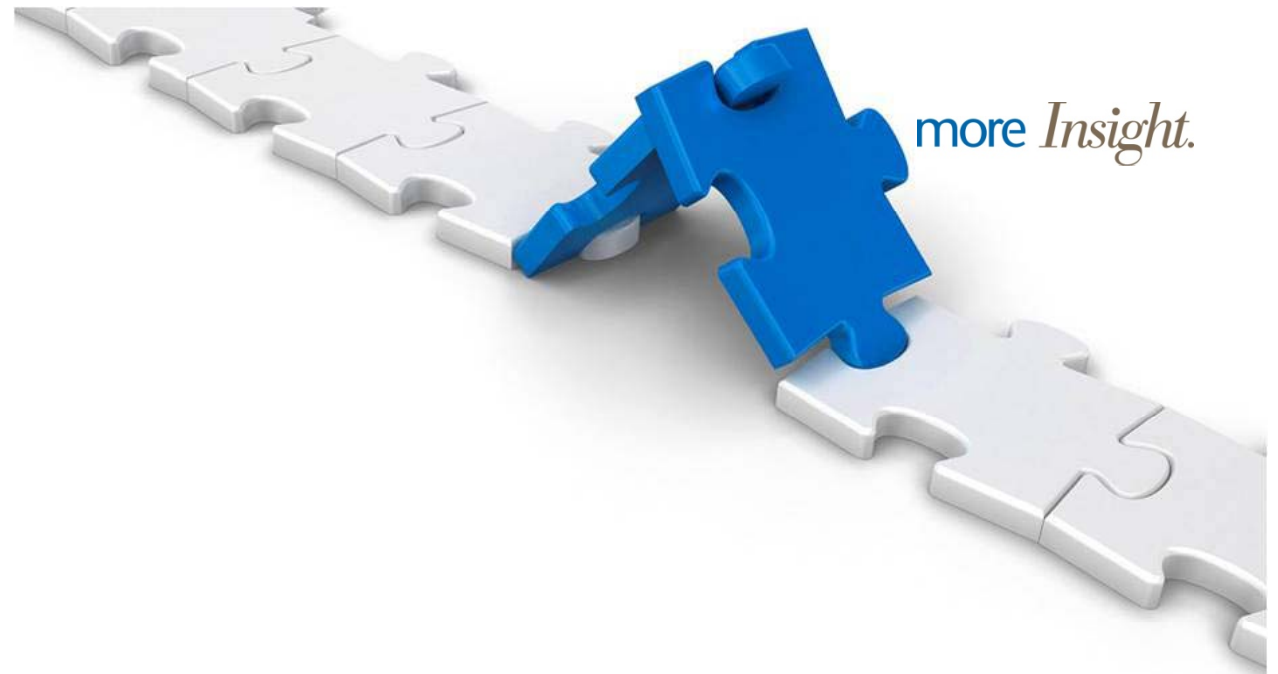
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## We will be covering:

- The use of GPS systems to track employees
- GPS tracking laws as they relate to employers
- Potential pitfalls of using GPS technology to track employees
- Current trends in the law
- Best practices for the implementation of GPS tracking by employers



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## I. Tracking Devices Generally

# What is a “GPS?”

- “Global Positioning System”
- Navigation and precise positioning tool
- Commercially, GPS is used as a navigation and positioning tool in airplanes, boats, cars, and for almost all outdoor recreational activities.



# How does the GPS system work?



- The GPS navigation system utilizes a system of twenty-four (24) satellites orbiting the earth.<sup>2</sup>
- The GPS satellites orbit the earth twice a day in regular patterns transmitting information back to Earth.<sup>3</sup>
- The GPS satellites receive signals from the ground, triangulate the signal's location, and then send the location information back to the receiver.<sup>4</sup>

# Why Track Employees?

## Increased Efficiency:<sup>5</sup>

- Streamlined travel
- Real-time progress updates
- Customer issues

## Compliance with Governmental Regulations:<sup>6</sup>

- Are workers taking their required breaks?
- Are overtime rules being followed?

## Compliance with Safety Laws:

- Speeding

# Why Track Employees?

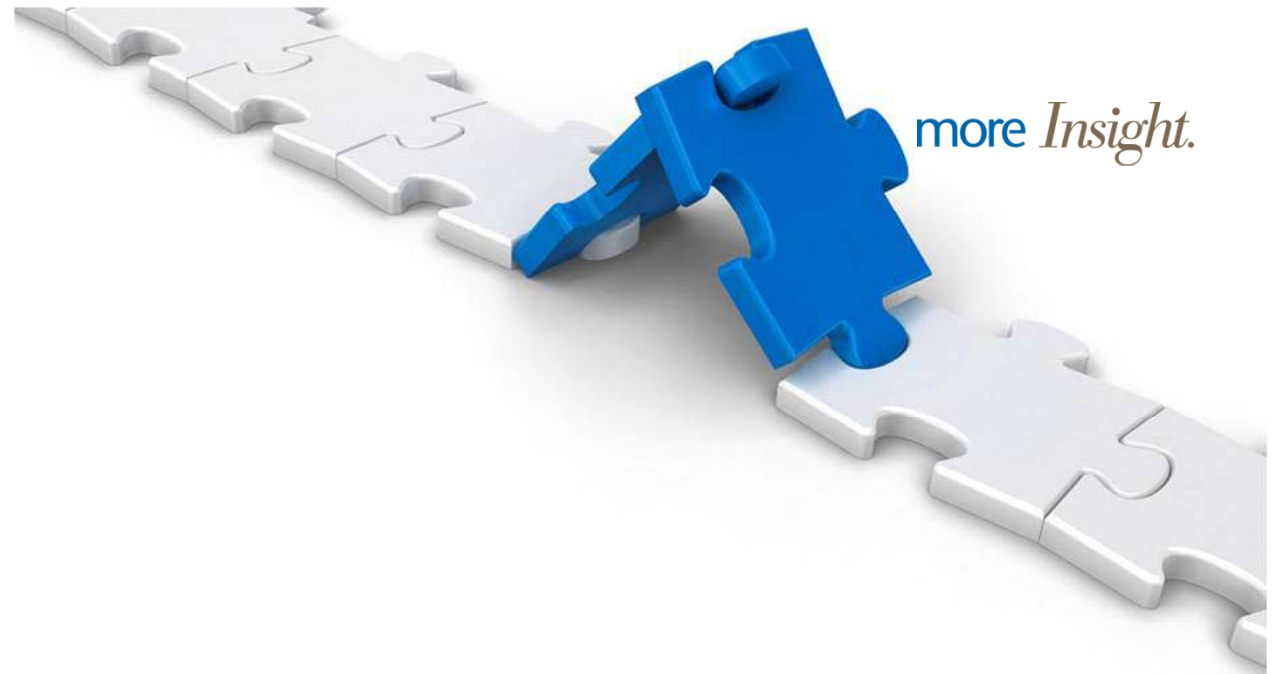
## Monitoring of Employees:<sup>7</sup>

- Are company policies being followed?
- Are timesheets accurate?
- Are employees safe?
- Are other methods of monitoring being subverted?
- Are employees doing personal errands on company time?
- Investigations



# Common Monitoring Techniques

- Placing GPS trackers inside of company-owned vehicles
- Issuing company-owned smart-phones or other electronic devices with GPS tracking capabilities
- Placing trackers on personally owned vehicles used in work-related activities\*
- Applications on smart-phones using GPS technology
- “Swipe” cards



## II. GPS Tracking Laws

## State Statutes

- While there is no federal statute that directly regulates the use of GPS monitoring for private employees, a few states have adopted laws aimed directly at regulating the use of electronic tracking in general.<sup>7</sup>
- These states include:
  - California
  - Connecticut
  - Delaware
  - Texas<sup>8</sup>

# California



Law: Cal. Penal Code § 637.7

Contents:

- Forbids the use of electronic tracking devices to determine the location of other individuals

Exceptions:

- Consent
- Law enforcement

Penalties:

- Violation of Code Section is a Misdemeanor
- Violations by business and corporations can result in a revocation of business license

# Connecticut



Law: Conn. Gen.Stat. § 31-48d

Contents:

- Requires Employers to give written notice of electronic monitoring to employees prior to the implementation of the monitoring.

Exceptions:

- Employers are exempt from the notice requirement when they fit two criteria:
  1. An employer reasonably believes that an employee is engaging in conduct that (i) violates the law (ii) violates the employer or the other employees of the employer's legal rights or (iii) creates a hostile workplace  
AND
  2. Electronic monitoring may produce evidence of one of the above beliefs.

Penalties:

- Civil fine

# Delaware



Law: Del. Code Ann tit. 11 §1335(a)(8)

Contents:

- “Invasion of Privacy”
- Forbids the installation of electronic tracking devices on the car of any other individual who is the owner, lessor or lessee of that vehicle without consent from the individual being tracked

Exceptions:

- Law enforcement
- Parents

Penalties:

- Class A misdemeanor

# Texas



Law: Tex. Penal Code Ann. §16.06

Contents:

- Forbids the placement of “electronic or mechanical tracking devices” on the vehicles of other individuals without consent.

Exceptions:

- Law enforcement
- Licensed private investigators working with consent of the car owner
- Good Samaritan Exception

Penalties:

- Class A misdemeanor

# State Constitutions

Protect the right to privacy through direct privacy protections as well as general protections such as incorporation of Fourth Amendment protection.

Example: Washington State's Constitution prohibits the infringement of a person's "private affairs" without the authority of law.<sup>9</sup>



# State Tort Law

## Invasion of Privacy Claims -

- ▶ appropriating the plaintiff's identity for the defendant's benefit
- ▶ placing the plaintiff in a false light in the public eye
- ▶ publicly disclosing private facts about the plaintiff
- ▶ unreasonably intruding upon the seclusion or solitude of the plaintiff

## *Unreasonable Intrusion:*<sup>11</sup>

1. An intentional invasion
2. Highly offensive to a reasonable person
3. Occurring where there is a reasonable expectation of privacy

\*Must have expectation of privacy

## *Publicity Given to a Private Life:*<sup>12</sup>

1. Individual created publicity regarding an event that concerned the private life of another
2. The event(s) publicized is the kind that is
  - (a) highly offensive to a regular person and
  - (b) is not of legitimate concern to the public

\*Must be “publicized”

## III. Current Trends in GPS Tracking Laws

# GPS Tracking by Employers

- Generally, courts have held that there is no reasonable expectation of privacy in relation to property owned by the employer...
  - Company-owned vehicles
  - Smart-phones

# GPS Tracking by Employers Continued...

Elgin v. St. Louis Coca-Cola Bottling Co. 2005 U.S. Dist. LEXIS 28976 (E.D. Mo. 2005)

## Facts:

- Coca-Cola placed GPS tracker on distribution van after cash shortages.
- Employee was cleared of any wrongdoing but was notified that GPS had been used to track him. The employee sued claiming that the GPS tracking was an invasion of his privacy

## Outcome:

- No expectation of privacy in a company owned vehicle and that the GPS tracking had only revealed “highly public” information about where the van had been.

# GPS Tracking by Employers Continued...

Willie Tubbs v. Wynne Transport Service, Inc., 2007 U.S. Dist. LEXIS 28920 (S.D. Texas 2007)

## Facts:

- GPS was installed on all trucks in transport company's fleet.
- Truck driver was involved in an altercation with company that resulted in his arrest
- After his arrest, the employee sued claiming that the GPS system represented an invasion of his privacy

## Outcome:

-While the case settled on other grounds, the court dismissed the invasion of privacy claim noting that it was not supported by law.

# GPS Tracking by Employers Continued...

**Matter of Cunningham v. New York State Dept. of Labor**, 89 A.D.3d 1347 (N.Y. Ap. Div. 2011)

## **Facts:**

- A twenty year state employee was suspected of taking unauthorized time off and falsifying his time records.
- Employer hired an investigator in an attempt to tail the employee, but the employee realized he was being tailed.
- Employer had investigator place a GPS on the employee's personal vehicle to gather evidence regarding unauthorized absences.

## **Outcome:**

- Court ruled that obtaining such information, via GPS, for one month was not unreasonable in the context of a noncriminal proceeding involving a high-level state employee with a history of discipline problems who had recently thwarted efforts to follow him in his nonwork-related ventures during work hours.



## U.S. v. Jones, 565 U. S. \_\_\_\_ (2012)

### Facts:

- Nightclub owner was suspected of dealing drugs.
- Without a proper warrant, the police placed a GPS tracker on his vehicle and subsequently used this information to convict the owner.

### Outcome:

- The warrantless GPS tracking amounted to a warrantless search and as such was unconstitutional\*

## Lessons Learned from Jones...

- After U.S. v. Jones, Employer usage of GPS tracking may be back up for debate because of the two lines of reasoning adopted by the Court:
  - First, that a GPS tracker represents a violation of an individual's right to privacy (may have implications on private employer's ability to track using GPS).

## Lessons Learned from Jones Continued...

- ▶ Additionally, Scalia's opinion in US v. Jones could open the door to claims against employers under a common-law trespass theory, where the property is not employer owned.
  - ▶ In Jones, Scalia relied heavily on common law notions of trespass to disallow the government's use of a GPS.
  - ▶ Where an employer placed a GPS on an employee's personal property, similar claims could be made.
  - ▶ Where the property is employer-owned, this issue would be irrelevant.



## IV. Best Practices for GPS Tracking by Employers

# 1. Become Familiar with the Laws That Affect Your Company

- Some states have specific laws relating to the use of GPS tracking
- Become familiar with how your state has interpreted the right of privacy
- Stay up-to-date on state and federal laws relating to the disclosure of employee records.
- Be safe, not sorry: make sure any information collected from GPS tracking is kept secure and confidential.

## 2. Give Notice of GPS Tracking to Employees

- Create a GPS tracking policy
  - Include an acknowledgement page.
  - Include a requirement to leave location services “on.”
- Include the GPS tracking policy in all employment contracts
- Notify employees of any changes in policy

### 3. Limit the Use of GPS Trackers to Company-Owned Property

- Based on prior cases, employees probably do not have an expectation of privacy with relation to employer-owned property.

## 4. Use GPS Tracking For A Specific Purpose

- Only Monitor During Work Hours



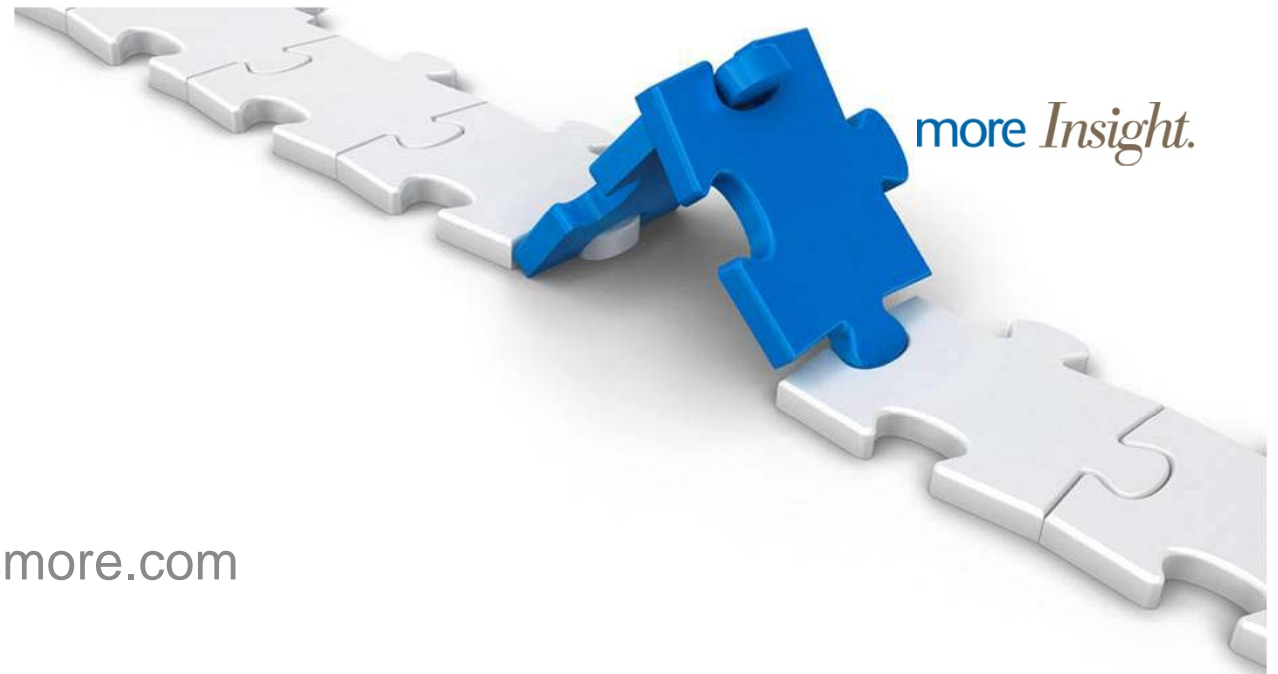
## 5. Focus ONLY on Relevant Information

- Only collect and store information that:
  - impacts their job performance
  - interferes with their job performance
- Discipline Issues

# Sources:

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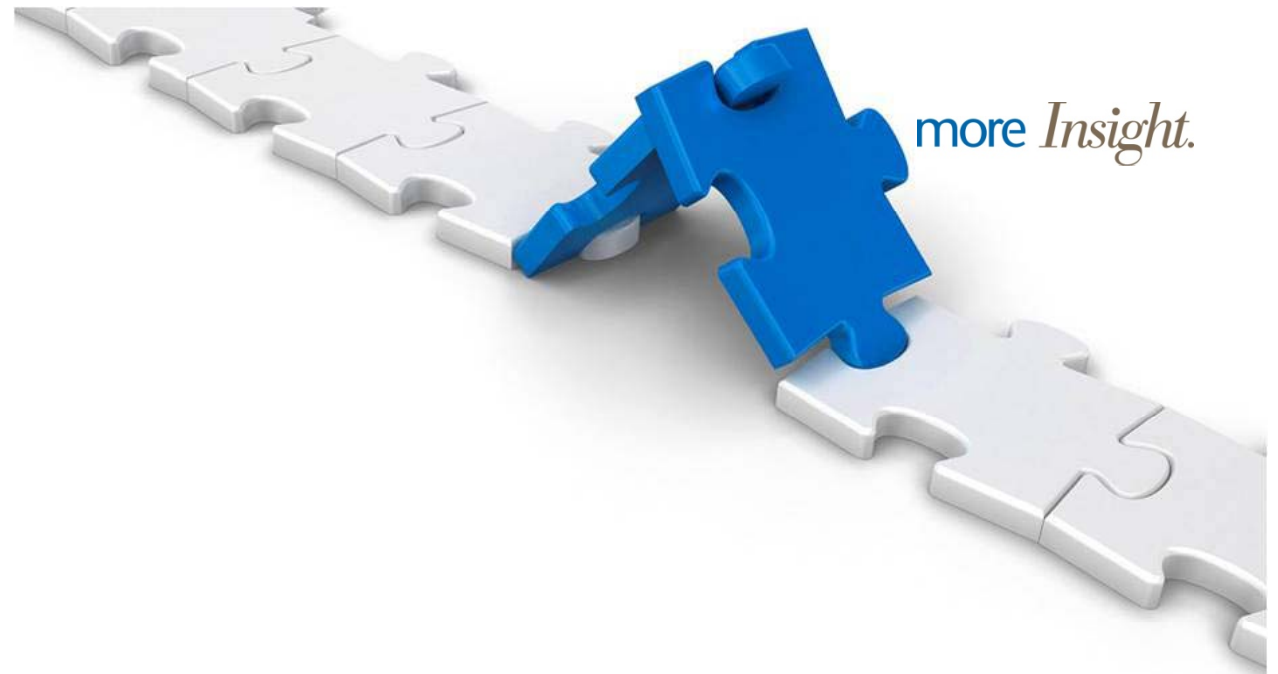
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## Questions?

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