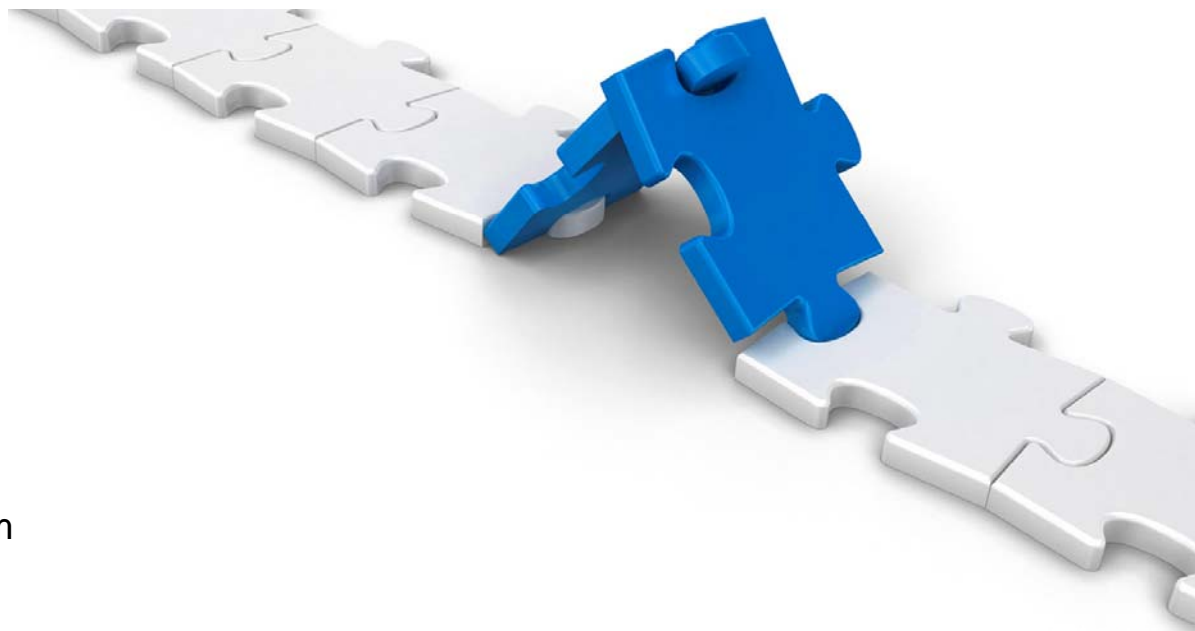




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Every Move You Make: Balancing Privacy Rights in the GPS Tracking of Sales and Other Employees

The Law, Potential Issues, and Best Practices.



Presenters

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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 to track employees
- Current trends in GPS tracking Laws
- Best practices for the implementation of GPS tracking by employers

A. Background

I. The Use of GPS Tracking Devices to Track Employees

What is a “GPS?”

- “Global Positioning System”
- System used to track physical location globally.
- Originally created by the military, civilian use of the GPS began in the 1980’s.¹



How does the GPS system work?



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

Global Positioning Systems

Types of GPS Units include:

- Handheld/Portable Units
- Car GPS Units
- Laptop based units
- Cell phones
- PDA units

B. GPS Employee Tracking: Why and How?

Why Track Employees?

Increased Efficiency:⁵

- Streamlined Travel
- Real-time progress updates

Compliance with Governmental Regulations:⁶

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

Why Track Employees?

Monitoring of Employees:⁷

- Are company policies being followed?
- Are timesheets accurate?
- Are employees safe?
- Are other methods of monitoring being subverted?

Common Monitoring Techniques

- Employers have a number of different techniques at their disposal when seeking to track employees. These techniques include:
 - Placing GPS trackers inside of company-owned vehicles
 - Issuing company-owned cell phones or other electronic devices with GPS tracking capabilities
 - Placing trackers on personally owned vehicles used in work related activities*

II. GPS Tracking Laws

Private Employers

- 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.⁷
- These States include:
 - California
 - Connecticut
 - Delaware
 - Texas⁸

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.

Connecticut



Exceptions:

- The use of electronic monitoring during criminal investigations is also exempt

Penalties:

- Violation of 31-48(d) may result in a civil fine of up to five hundred dollars for the first offense, one thousand dollars for the second offense and three thousand dollars for a third offense.

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

III. Potential Pitfalls of GPS Employee Tracking

Employee Privacy Concerns

1. State Constitutions: Invasion of Privacy Claims

- While few states specifically regulate the use of GPS tracking by employers, state privacy laws may be used to challenge the use of GPS tracking by employers.

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

State Tort Law

2. State Tort Law: Invasion of Privacy Claims -
Where not expressly protected by a state constitution, state tort law may protect an individual's right to privacy.

Two common-law claims that are potential liability issues for Employers who use GPS are, *unreasonable intrusion* and *Publicity given to a public life*¹⁰

Types of State Law Tort Claims

*Unreasonable Intrusion:*¹¹

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

Types of State Law Tort Claims Continued...

*Publicity Given to a Private Life:*¹²

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”

IV. Current Trends in GPS Tracking Laws

1. GPS Tracking in Criminal Cases

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*

2. GPS Tracking by Employers

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

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...

- 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:
 1. That a GPS tracker represented a physical entry onto an individual's personal property (not threatening to an Employers ability to track employees as they would own the property).
 2. That a GPS tracker represents a violation of an individual's right to privacy (may have implications on private employers ability to track using GPS).

V. Best Practices for GPS Tracking by Employers: Five Tips to Avoid the Pitfalls of GPS Tracking

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

- Some states contain specific provision relating to the use of GPS tracking
- Become familiar with how your state has interpreted the right to privacy
- Remain up-to-date on changes in the law

2. Give Notice of GPS Tracking to Employees

- Create a GPS tracking policy
- Include the GPS tracking policy in all employment contracts
- Include an addendum to the contract giving consent to track
- 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 including: cars, cell phones, and personal digital assistants (PDAs).
- Placing GPS devices on or inside of company owned property leaves little danger of violating state trespass laws if GPS trackers are placed on company property.
- If property is leased to employees, there may still be a notice requirement to place a GPS tracker on a vehicle under state law.

4. Use GPS Tracking Sparingly

- Only Monitor During Work Hours!
- Only employ GPS monitoring where other means of (legal) surveillance have come up short.
- Only monitor where there is a reasonable belief that information gained could prove wrongdoing on the part of the employee.

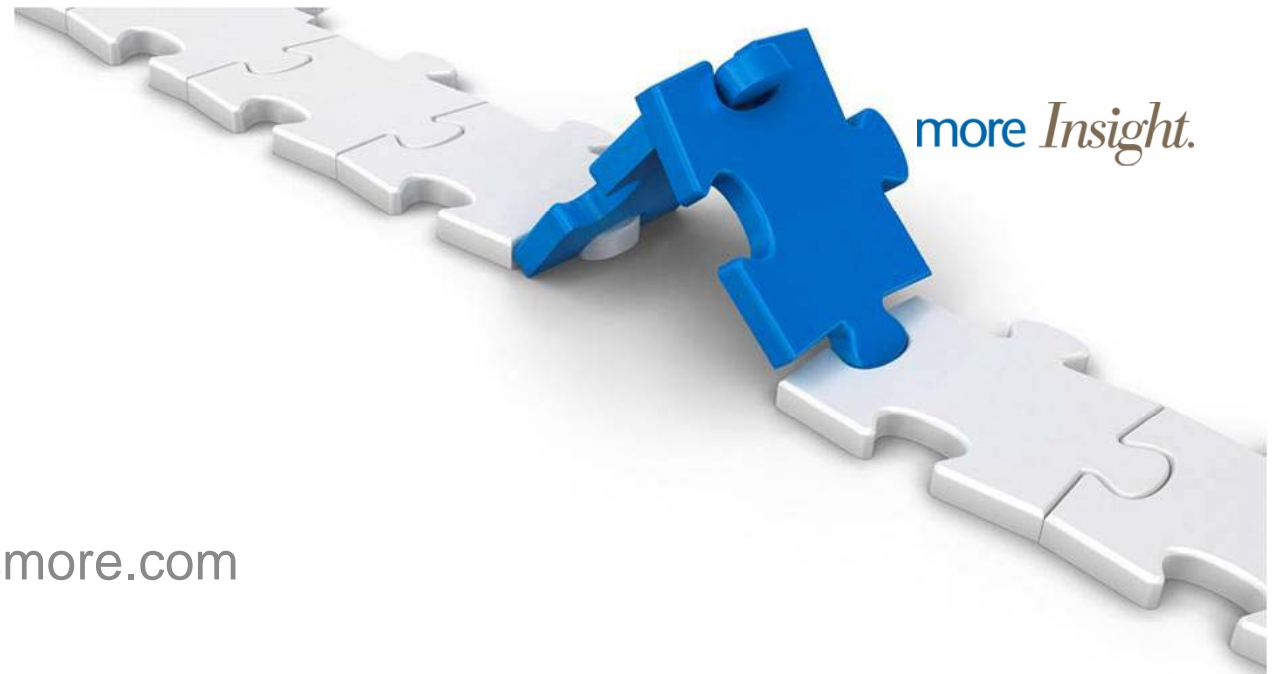
5. Protect Information From Being Disclosed

- Become familiar with 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.

Sources:

Works Cited:

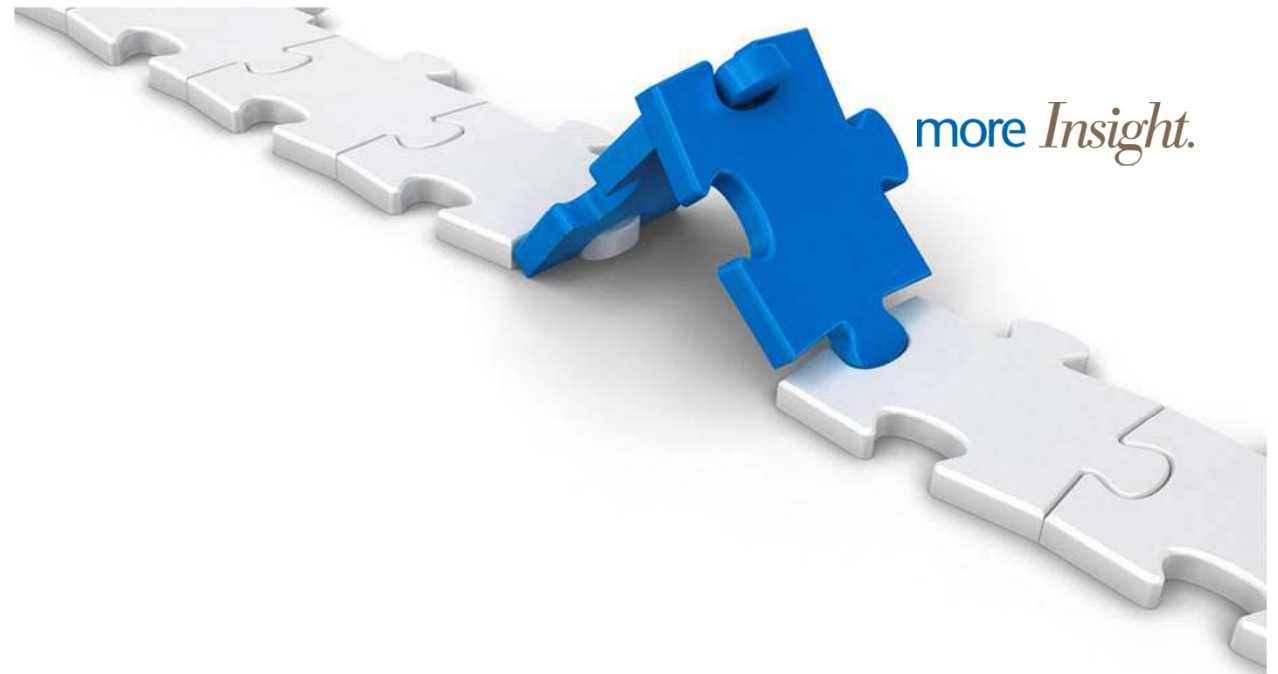
1. GPS Overview, Gps.gov (April 12, 2012), <http://www.gps.gov/systems/gps/> (last visited June 6, 2012).
2. Id.
3. Id.
4. Tracking Employees Using Technology, Neslon Adrian Blish and Sharon P. Stiller. ACC Docket (July/August 2009).
5. Id.
6. Id.
7. Id.
8. Location Surveillance by GPS: Balancing an Employer's Business Interest with Employee Privacy, Kendra Rosenberg. 6 Wash J.L. Tech. & Arts 143 (2010).
9. Privacy Protections in State Constitutions, National Conference of State legislatures (last visited June 6, 2012), <http://www.ncsl.org/issues-research/telecom/privacy-protections-in-state-constitutions.aspx> (last visited June 6, 2012)
10. Location Surveillance by GPS: Balancing an Employer's Business Interest with Employee Privacy, Kendra Rosenberg. 6 Wash J.L. Tech. & Arts 143 (2010).
11. Stopping Employees In Their Tracks: GPS Tracking of Employees, David Marshall and Craig Friedman. Mealey's Litigation Report: Employment Law (Vol. 4, #3 Oct. 2007).
12. Id.



Questions?

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The End