

## iSpy: Tracking Employees with GPS Technology on Mobile Devices

More than 90 percent of the 322 million cellular phones in use in the United States contain global positioning system (GPS) tracking devices that allow wireless carriers to obtain continuous, highly accurate information regarding the location and movement of users.<sup>1</sup> The use of this technology in automobiles and cellular phones helps individuals navigate their daily travels with ease and provides innumerable benefits to consumers and emergency response units.<sup>2</sup> However, in an effort to increase employee efficiency, productivity and accountability, an increasing number of employers are monitoring employees by tracking their location and movement through GPS technology contained in mobile devices.<sup>3</sup>

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## NEWSLETTER

November 2014



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<sup>1</sup> Clifford M. Marks, "Security or Privacy? Courts Split on Warrantless GPS Tracking," *Wall Street Journal Law Blog* (August 16, 2010); Leslie T. Thornton and Edward R. McNicholas, *Successful Partnering Between Inside and Outside Counsel*, Volume 5, Chapter 82, "Privacy and Security," Thomson Reuters Westlaw™ and the Association of Corporate Counsel (ACC), 2000–2014.

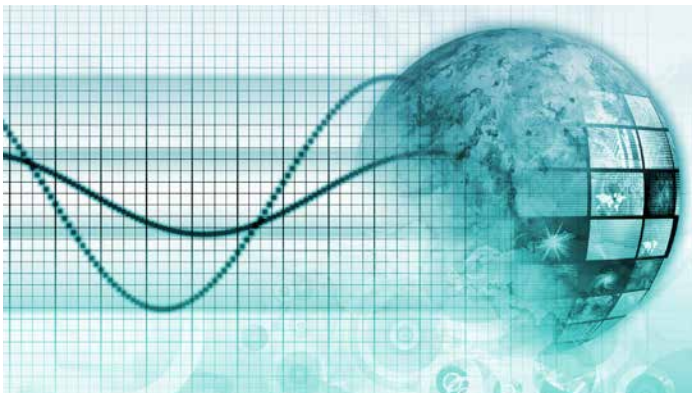
<sup>2</sup> Adam Cohen, "The Government Can Use GPS to Track Your Moves," *Time Magazine*, August 25, 2010.

<sup>3</sup> William A. Herbert, Amelia K. Tuminaro, "The Impact of Emerging Technologies in the Workplace: Who's Watching the Man (Who's Watching Me)?" *Hofstra Labor & Employment Law Journal*, Vol. 25, Issue 2 (2008), 355–356.

The introduction of GPS technology into the modern workplace raises a myriad of statutory and constitutional concerns regarding the threat it poses to an individual's right to personal privacy.<sup>4</sup> Although courts have yet to address the issue of employer GPS monitoring through cellular phones, constitutional privacy protections and federal case law on privacy may lay a doctrinal foundation from which to guide employers looking to use this technology in the workplace.

#### WHAT IS GPS TECHNOLOGY?

GPS comprises a network of satellites that orbit the earth while transmitting signal information to receivers on the ground. By measuring the time it takes a GPS satellite's signal to reach a receiver, the receiver is able to triangulate the location of a unit anywhere on or near earth within three meters of its exact location.<sup>5</sup> By using this technology to track an employee's cellular phone, an employer may gather information such as the routes traveled by its employees, the frequency and location of all stops made, and whether the device has exited a predetermined territory.<sup>6</sup>



4 Tracy J. Hasper and Gordon F. Lull, "Where on Earth? GPS Tracking Devices Raise Fourth Amendment Issues for Civil and Criminal Law Practitioners Alike," *Los Angeles Lawyer*, September 2009, 30–32.

5 Christopher R. Orr, "Your Digital Leash: The Interaction Between Cell Phone-Based GPS Technology and Privacy Rights in *United States v. Skinner*" (2014) 45 *University of Toledo Law Review*, 377, 379.

6 Lothar Determann and Robert Sprague, "Intrusive Monitoring: Employee Privacy Expectations Are Reasonable in Europe, Destroyed in the United States" (2011) 26 *Berkley Technology Law Journal*, 979, 1012.

#### IS SUCH MONITORING AN UNLAWFUL SEARCH UNDER THE FOURTH AMENDMENT?

Monitoring the location and movement of *public sector* employees' cellular devices raises the question of whether such tracking constitutes an unlawful search under the Fourth Amendment to the U.S. Constitution, which provides in part:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched ...

In light of the dearth of federal case law dealing with GPS tracking in the civil context, public sector employers looking for guidance on this issue must look to the legal analytical framework applied by the government when addressing GPS tracking in the criminal context. Historically, the determination of whether a search took place under the Fourth Amendment focused on whether a physical trespass into a "protected area" occurred.

In *Katz v. United States*, 88 S. Ct. 507; 19 L. Ed. 2d (December 1967), however, the court responded to the warrantless wiretapping of a public telephone by shifting its definition of whether a "search" occurred from trespassory intrusions to whether expectations of privacy that an individual reasonably relied on were violated. In doing so, the court held that the Fourth Amendment "protects people, not places."<sup>7</sup> Recognizing that the constitutionality of a search under the Fourth Amendment relies on the definition of a reasonable expectation of privacy, Justice Harlan proffered a two-pronged test in his concurring opinion to guide future

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7 *Katz v. United States*, 389 U.S. at 347.

courts' determination of what qualifies as a reasonable expectation of privacy.<sup>8</sup> The test asks (1) whether there is a subjective expectation of the individual that his action will be private and (2) whether such expectation is one "that society is prepared to recognize as 'reasonable.'"<sup>9</sup>

Since the court's ruling in *Katz*, a body of case law has developed regarding the constitutionality of GPS monitoring and its implications on Fourth Amendment rights. Courts navigating this issue have based their rulings on the nature and volume of information transmitted by the monitoring device at issue,<sup>10</sup> the length of time the individual was monitored<sup>11</sup> and whether he or she was monitored while traveling on a public road.<sup>12</sup>

Most recently, the U.S. Supreme Court decided *United States v. Jones*, 132 S. Ct. 945, 181 L. Ed. 2d (January 2012), and found that planting a GPS device in a vehicle was a trespassory violation of property that constituted an impermissible search under the Fourth Amendment. The court's opinion emphasized the "particular attention" that must be paid to the issue of GPS monitoring given the technology's unique ability to transmit "a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." The court expressed concern that affording the government unfettered discretion to obtain such intimate information may "alter the relationship between citizen and government in a way that is inimical to democratic society." In light of these developments, employers in the public sector should review any GPS tracking practices and keep an eye out for further developments outlining the boundaries of when and how GPS tracking might be unconstitutional.



#### COMPETING STATE APPROACHES TO EMPLOYER GPS TRACKING

Public and private employers should be aware of civil and criminal statutes regulating an employer's ability to track the location of their employees.

In Connecticut, for example, employers are permitted to use GPS devices to monitor employees so long as they provide them with written notice of electronic monitoring prior to the implementation of such, except in those situations where an employer reasonably believes that electronic monitoring may produce evidence that an employee is engaging in conduct that (1) violates the law, (2) violates the employer's or the employer's employees' legal rights or (3) creates a hostile workplace. Both Texas and Delaware have enacted criminal statutes forbidding the installation of monitoring devices on the car of any individual without consent.

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<sup>8</sup> See *United States v. Maynard*, 615 F.3d at 544.

<sup>9</sup> *Katz v. United States*, 389 U.S. at 347.

<sup>10</sup> *United States v. Knotts*, 460 U.S. 276 (1983).

<sup>11</sup> *United States v. Maynard*, 615 F.3d 544, 563 (D.C. Cir. 2010).

<sup>12</sup> *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010).

In California, Penal Code section 637.7 prohibits any person or entity within the state from using “an electronic tracking device to determine the location or movement of a person.” As used in this section, an “‘electronic tracking device’ means any device attached to a vehicle *or other movable thing* that reveals its location or movement by the transmission of electronic signals.” (*Emphasis added.*) Of particular significance to employers, section 637.7 does not apply “when the registered owner, the lessor, or lessee of a vehicle has consented to the use of the electronic tracking device *with respect to that vehicle.*” (*Emphasis added.*) However, section 637.7 does not contain an express exception for consent where a tracking device is installed on a “movable thing” other than a vehicle. Without any reported cases, it remains to be seen how section 637.7 might apply in the context of an employer monitoring an employee’s movement through GPS technology on mobile devices.

#### CONCLUSION

GPS technology has developed and expanded much faster than the laws and regulations aimed at governing its use. Accordingly, employers wishing to use GPS surveillance in the workplace must do so with caution to avoid incurring civil or criminal liability. Where monitoring practices are not expressly prohibited by law, such employers would do well to obtain and document the consent of their employees and collect only that data intended to be used for legitimate business purposes.

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