

Author

Elizabeth A. Bailey
Direct dial: 603.627.8241
Fax: 603.641.8754
ebailey@sheehan.com

Karyl Roberts Martin
Direct dial: 603.627.8292
Fax: 603.641.2394
kmartin@sheehan.com

Practice Areas

Labor, Employment and
Employee Benefits

Good Company

Keeping Track of Your Employees: Use of Electronic Monitoring May Be an Invasion of Privacy

Friday, May 04, 2012

Employers who use location-tracking devices such as a Global Positioning System (GPS) or smartphone may want to revisit their current policies after the U.S. Supreme Court's recent decision in *United States v. Jones*, 132 S. Ct. 945 (January 23, 2012), in which a majority of the justices held that the installation of a GPS in a criminal suspect's vehicle to track his movements was a search under the Fourth Amendment. Although the Court's ruling was in the context of a criminal case, employers who use these devices to track the locations of their employees should be careful to respect their employees' privacy rights.

The Facts of the *Jones* Case

In the *Jones* case, the defendant was suspected of drug trafficking and became the target of a criminal investigation conducted by a joint FBI and District of Columbia Metropolitan Police Department task force. After using other investigative techniques, including visual surveillance of Mr. Jones's nightclub, the Government applied for a warrant to use an electronic tracking device on a vehicle registered to Mr. Jones's wife.

The Court issued a warrant authorizing the installation of the device in the District of Columbia within ten days. Instead, the Government installed a GPS tracking device on the undercarriage of the Jones vehicle on the 11th day and in Maryland. Once installed, the GPS established the vehicle's location within 50 to 100 feet and communicated this location by cell phone to a computer. The Government used this device to track the Jones vehicle for 28 days and received over 2,000 pages of data within this time frame.

Eventually, the Government obtained a multi-count indictment against Jones for possession of and conspiracy to distribute cocaine, in violation of federal law. Before his trial, Jones tried to suppress the evidence that was obtained from the GPS. The trial court suppressed the evidence that had been obtained when the vehicle was parked in the garage adjoining Jones's property. However, the trial court held that the other GPS data was admissible, reasoning that a person who traveled in a car on public roads has no reasonable expectation of privacy in those movements.

The Court of Appeals reversed the conviction, finding that the installation and use of the GPS without a warrant violated the Fourth Amendment.

The Supreme Court's Decision

The U.S. Supreme Court affirmed the reversal of Jones' conviction,

holding that the Government's installation and use of the GPS to monitor a vehicle's movements amounted to a "search" of the vehicle under the Fourth Amendment. Justice Scalia based his opinion (in which three other justices joined) on the fact that the Government "physically occupied private property for the purpose of obtaining information," which he said would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted. Although the Court did not address directly whether use of a tracking device without a "physical invasion" would have been considered a search as well, in a concurring opinion, Justice Sotomayor noted that "physical intrusion is now unnecessary to many forms of surveillance. With increasing regularity, the government will be capable of duplicating the monitoring undertaken in this case by enlisting factory- or owner-installed vehicle tracking devices or GPS-enabled smartphones." The Court left for another day whether these types of tracking devices would also violate the vehicle owner's reasonable expectations of privacy.

Considerations for Employers in Monitoring Employees' Locations

Although the *Jones* case doesn't address directly whether an employer can monitor employees through GPS or similar devices, employers should review carefully their policies and procedures for using these devices to ensure that employees' privacy rights are protected.

For public sector employers, who may be subject to a variety of employment claims that are based on alleged violations of the U.S. Constitution, the *Jones* case instructs that a government's use of location tracking devices has constitutional implications. Even private sector employers should be asking themselves whether the benefits of using GPS tracking devices outweigh potential pitfalls, as employees' common law privacy rights may be implicated.

The benefits of using GPS to monitor employees include the ability to know an employee's location during work hours and to confirm that the employee is (or is not) tending to work-related responsibilities. Depending on the employer's operations, there may be additional benefits, including being able to track an employee's delivery route or being able to monitor an employee's whereabouts for the employee's own safety.

There are obvious pitfalls. Monitoring employees may result in lower employee morale. Employees may also feel that their privacy is being invaded, or that the employer does not have the right to monitor their location during off-duty hours and meal breaks.

If you decide to use a location-tracking device to monitor your employees, at a minimum, you should have a written policy informing your employees that a GPS may be installed or smartphone tracking activated to monitor their location during work hours. Some states, including New Hampshire, have legislation pending that would require written consent or a court order before using an electronic tracking device to monitor an employee's location.[1] Safeguards should be put in place to ensure that the tracking devices are not abused to monitor employees during off-hours, such as weekends, and that employment decisions are not based on information obtained from tracking an employee's location. Employers using these devices should consult their legal counsel for further developments in this area of the law, as it is likely to continue evolving in the wake of *Jones* and as technology changes.

This article is intended to serve as a summary of the issues outlined herein. While it may include some general guidance, it is not intended as, nor is it a substitute for, legal advice. Your receipt of Good Company or any of its individual articles does not create an attorney-client relationship between you and Sheehan Phinney Bass + Green or the Sheehan Phinney Capitol Group. The opinions expressed in Good Company are those of the authors of the specific articles.

[1] The New Hampshire bill (HB 445), which would prohibit the use of electronic tracking devices to track an



SHEEHAN
PHINNEY
BASS +
GREEN PA
the business law firm

individual without the consent of the individual or a court order (with limited exceptions), had been referred to an interim study committee as of the writing of this article.