

New Jersey Prohibits Employers From Tracking Employees' Vehicles Without Warning

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Recent technological advancements have made employer's ability to monitor and track employees easier and more cost effective than in the past. In response to this trend, recently enacted legislation prohibits employers from using a tracking device in an employee's or company's vehicle unless prior written notice is provided to the employee.

The intent behind the new law is to protect workers' privacy rights. However, the Legislature clearly recognized that employers have a legitimate interest in knowing where their employees are and, under certain circumstances, knowing where they have been. The law provides a compromise between the legitimate interests of both employers and employees. It allows employers to track their employees while, at the same time, allowing employees to make informed decisions based on the notice required by the statute, including whether they want to work for an employer who tracks their whereabouts.

The law applies to all employers operating in the State of New Jersey and their agents or representatives, except the Department of Corrections, State Parole Board, county correctional facilities, State or local law enforcement agencies, or any public transportation system.

The law provides that employers are not permitted knowingly to use a tracking device in a vehicle used by an employee when the device is designed or intended to be used for the sole purpose of tracking the movement of a vehicle, person or device. While the original bill had some ambiguity regarding employers who "make use of" an electronic communication device in a vehicle owned or operated by an employee, including possibly imposing liability even if that device was not actually being used for tracking an employee, the Governor had concerns regarding this language and issued a conditional veto. In response, the final version of the bill applies only to devices that are designed or intended to be used for the purpose of tracking employees. Therefore, an employer who calls an employee on a company cell phone while the employee is in the vehicle would not be covered by the bill because tracking is not the phone's intended use.

As relates to any "tracking device," when an employer is using the tracking device solely to document employee expense reimbursement, the proposed law would not apply and, therefore, would not require advance notice to the employee. For example, an employer theoretically would have the right to install a mileage tracker on an employee's personal vehicle to log the distances travelled for business purposes if used solely for expense reimbursement purposes (and not, for example, for checking on the employee's whereabouts).

Employers have many legitimate reasons for tracking employees when they are off the employer's premises and current technology offers a convenient solution. Tracking employee travel can help employers to implement more efficient routes

or better enforce company policies. It also can provide employers access to real-time location information to better communicate with customers, such as those expecting deliveries or service appointments.

The law permits employers to use these devices, including to track their employees, whether they are in personal or company-issued vehicles. However, under both circumstances the employer is obligated to provide the employee with notice that the employer may use these devices, including for purposes of tracking their whereabouts.

While the original bill initially provided that there would be civil and criminal penalties for employers who track their employees' vehicles without providing notice, the Governor vetoed the provision that would have imposed criminal penalties. The final version of the law only imposes civil penalties on businesses. An employer who knowingly uses a tracking device in a vehicle used by an employee without providing written notice to the employee will be subject to a penalty of up to \$1,000 for the first violation and up to \$2,500 for each subsequent violation.

While there are no Federal laws that prevent a business from monitoring employees with the aid of a tracking device, some states already have laws limiting tracking. In New York it is legal to use GPS to track a vehicle's location when the vehicle is company-owned. But, when a vehicle is owned by an employee, as in the case of *Cunningham v. New York State Dept. of Labor*, 21 N.Y.3d 515 (NY Ct. App., 2013), the employee must give consent and tracking is limited only to business hours. In *Cunningham*, the court held that installing a GPS device on a vehicle personally owned by a state employee suspected of falsifying time records is considered a "search" and therefore the employee was entitled to Fourth Amendment protection.

Cunningham only applies to a public employer, and the Fourth Amendment does not limit a private employer's ability to search its employee's vehicle. However, the case offers guidance to private employers who want to track an employee's personal vehicle. In general, the tracking must be reasonable and not excessive. It would be reasonable for a New York employer to utilize a GPS tracker within an employee's work hours. On the other hand, tracking an employee's location with a smartphone or laptop presents more potential for a search to be deemed excessive because those devices are likely to be taken into private places regardless of the time of day. New York employers who wish to track their employees using such devices should consult with legal counsel and take care to craft specific policies.

Likewise, in Massachusetts an employer has a right to install a GPS tracker on a company-owned vehicle. However, if an employer is considering tracking the location of an employee in his/her personal vehicle, care should be taken to craft reasonable policies. It is recommended that notice be provided to the employee as well.

Key Takeaways:

Monitoring and surveillance have become more important particularly when managers and supervisors do not physically occupy the same space as employees. If an employer allows employees to operate company vehicles or wishes to track employees' movements, it is imperative that it check the laws in each state where it operates. The company policy should then be updated to ensure compliance with applicable state law.

For New Jersey employers now operating under this newly enacted law, the next step is to draft written notices which will be provided to all current and new employees if the company intends on using any devices to track its employees. It is recommended that employees sign an acknowledgement of receipt of the policy with the notice, to ensure employers have complied fully with the new requirement that written notice be provided to employees. Employers should keep a record of this documentation in the employees' personnel file.

