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## Tracking Employees: How Far Can (and Should) Employers Go?

By Jack Schaedel

It is a question of growing concern not only for employers who have increasingly embraced non-traditional working arrangements such as telecommuting, but also for those who have always employed an itinerant workforce of sales professionals, consultants, service technicians, and the like: "Where ARE my employees all day?" As in many facets of 21st-century life, technology provides a few answers. But are they the right answers, or do they simply raise more thorny questions?

The tried and true method of tracking employees' progress through a day, relying heavily on self-reporting, has serious drawbacks. For one, employees can embellish the time it took to get from Point C to Point D or the length of time spent with a particular client. For another, employees can forget about certain work until several weeks or months after the fact. Sometimes, this is genuine forgetfulness and innocent of motive; other times, employers might believe an employee's memory is jogged suspiciously close in time to the filing of a class action lawsuit. As an employer, questioning an employee's current or recent time on a daily basis may feel like a hassle (or may feel to the employee like harassment or hyper-scrutiny), but learning weeks or months later about time an employee worked, but forgot to report and would like to be paid for now, can be an unpleasant and costly surprise. This is particularly so in a state like California, which provides for penalties for "waiting time" if wages are not paid when due, penalties for late payment of wages (usually, more than seven days after they are earned),

penalties for inaccurate wage statements that do not reflect the precise hours worked, and complicated requirements for retroactively recalculating a new "regular rate of pay" in a given week where later events (such as the employer's receipt of commissionable revenues or payment of non-gratuitous bonuses) occur based on events in that week.

To eliminate or reduce the impact of human error, forgetfulness, or calculated misreporting of time by employees, it is tempting for employers to rely on GPS tracking devices, which can provide shockingly precise reports, in real-time, of employees' locations, movements, and speed. One employer who took this route is Intermex, a processor of money-transfer services. Intermex, through a supervisor, required several sales executives and account managers to download an app called Streetsmart onto their mobile phones. The app contained a GPS function that tracked the exact location of the phone's user, and allowed employees to create electronic timecards on their phones to track the start and end of their shifts and breaks. Although the app could be turned off, it continued to run in the background, prompting at least one employee to remove it from her phone completely. According to a complaint she filed in California Superior Court, she was fired as a result.

The lawsuit raises privacy concerns as well as employment law concerns. Some states such as California have explicit constitutional rights of privacy. With no legitimate need to know employees' whereabouts or activities during off-hours, employers may be hard-pressed to justify tracking them. California public policy also prohibits termination of an employee for lawful off-duty conduct. As with a pre-employment inquiry or forbidden interview question, the potential danger to employees is that gathering the information may create an inference that an employee's termination was based on activities or information that could not have been an explicit rationale for failure to hire, failure to promote, or other adverse job action.

The continuing development of technology offers employers numerous ways to track employee activity, increase precision in payroll systems, control costs, and enhance productivity. Employers today can track keystrokes, computer usage, telephone usage, and other activity on the job. Yet, where employees feel that employers' efforts go too far, i.e., beyond the workplace and outside of the normal work day, some employees may avoid employment if they perceive it as costing them too much privacy and liberty, or as Intermex has found, going further and suing. Employers in California and other states may wish to track the *Arias v. Intermex* suit, and consult their counsel regarding constitutional and statutory limits on the right to monitor employees.

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