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When Monitoring Your Employees Goes Horribly Wrong

Companies now have an array of technologies to monitor employees during work hours. Use these tools the wrong way, however, and you can expect an expensive lawsuit.



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Technology has given employers the power to track practically every move of their employees. But just because you have the ability to see where the cute receptionist goes after work, or where the rough-around-the-edges account manager goes during his lunch break, doesn't mean you should.

Employee monitoring technology is great for tracking down the company car, checking into employee reimbursement requests, or making sure your sales reps aren't off drinking at the bar when they

should be at the office. If you aren't careful about whom you're monitoring, when, and how often, though, you could find yourself getting sued.

[Todd Wulffson](#), a partner at California-based employment and labor law firm Carothers DiSante & Freudenberger, is one of an increasing number of lawyers who defend employers in cases involving employee monitoring gone wrong. "These cases have people up in arms in an Orwellian kind of way," [Wulffson](#) says. "The problem is that technology is advancing faster than a lot of people's comfort levels, And the laws are playing catch-up." He says in the last four years he has represented 12 companies in employee monitoring suits, compared with three in the preceding 20 years.

When an employee sues an employer for unlawful monitoring, it usually goes to court as a generic invasion of privacy claim. [Wulffson](#) says he has seen cases where companies catch employees doing something a quarter mile away from the office, thanks to a digital zoom lens, or farther with help from a drone. Most commonly though, the technology involved is a GPS tracker on an employee's smartphone.

"Ten to 15 years ago, you couldn't do this type of thing. But now if you have a company-provided smartphone, the employer has a legitimate business interest and needs to know where its property is going," [Wulffson](#) says. "But if the employer is tracking his employees during their off hours and they discover things that the employee doesn't want the employer to know, that generates litigation."

While cases of this type are still relatively rare, Wulffson says he expects them to spike as technology gets better and cheaper. Read the monitoring-gone-wrong stories and the rules you need to live by below.

The company car

[Wulffson](#) offers this awkward scenario he encountered recently: An hourly employee, who is driving a company car, takes a lunch break. The manager, who has the ability to track its cars, pulls up the map and sees that this employee is enjoying his break at a local strip club. The employee is fired, and the manager, who knows the employee's wife, calls to tell her that she should ask her husband why it happened.

The employee sues, claiming the company wrongfully terminated him and violated his privacy by telling his wife. "We can't afford to have people see our name attached to the strip club," the manager explains during the suit, but predictably, the company loses. The lesson here is you cannot track employees during their breaks or after work. "Who cares what he does during his lunch hour?" [Wulffson](#) says. "We shouldn't be looking at where they are during lunch or after work and we shouldn't be telling his wife about it."

The company smartphone

According to **Wulffson**, the majority of monitoring lawsuits arise from employers using an employee's company-issued smartphone to keep an eye on his whereabouts. "The law says you can track employees during work hours, but the technology is allowing you to monitor 24/7," he says. "You can tell management all day long they aren't allowed to monitor employees during off hours, but they'll do it anyway."

A recent case he recounts, which the employer won, came down to the exact time the employer checked to see where a phone was located. On a Friday morning, an employee of a financial services company told his boss that he was sick and would have to miss a critical meeting with clients that day. At 2 p.m., the employer tracked the employee's smartphone and found that he was lounging poolside at a Las Vegas casino, over 100 miles away from his home in California.

When the employee came back to work, the employer asked why his phone was in Vegas while he was sick at home. The employee said he got better, so he left for the trip. "The bosses said, 'Isn't that convenient--you're fired,'" **Wulffson** says. The termination was legitimate, he says, because they confronted the employee about it and he had a really bad answer. "They fired him and it was fine," he says. "But if they had looked at where his phone was at midnight, they would've been in the wrong because the employer has no right to know where an employee is at midnight."

Release the drones

Another of **Wulffson**'s clients ran a construction site in California, where employees worked largely without supervision. The structure they were building was still a skeleton, with employees installing electrical wires on the top floors before the walls went up.

"They send a drone up to the fourth floor of the building [to monitor the workers] and two employees were having sex during their break," **Wulffson** says. The employees were fired. They sued, arguing that no one could see them on the fourth floor from the ground level, and the company wouldn't have known if it hadn't sent the drone to the site.

Believe it or not, **Wulffson**, says, the case will settle in the employees' favor. "You can absolutely, positively not use a drone to monitor employees unless the employees are advised of it in advance, which they weren't in this case," he says. "Even then, the drone has that 'Big Brother-ish' feel to it. A jury will never tolerate a drone or a super-zoom camera or a parabolic microphone, or any other technology people wouldn't expect you to use."

Rules to monitor employees by

Wulffson says the rules below will ensure you never breach privacy expectations when monitoring employees:

1. Disclose to employees any monitoring you're conducting.
2. Have a legitimate business interest in the monitoring you're doing.
3. Do a cost-benefit analysis of GPS tracking every one of your company phones compared with the information you might occasionally get from it.
4. Make sure the monitoring is done consistently across all members of your workforce by people who are trained and whom you trust to uphold the law.

"Do not give every manager the ability to track every employee who works for them," Wulffson adds. "It is only for the employee who is going out for a lark during the day that you need to get the managers involved. The companies getting sued are giving access to everyone and it's causing problems because people cannot follow rules."

And whatever you do, don't get all *Law and Order* on your employees. "This isn't about catching people doing bad things," Wulffson says. "It almost always goes badly when the employer wants to trap the employee. We're not setting up a sting operation. We're setting up rules and helping people follow them."