Employment Law Letter

Spring 2008

GPS UNIT IN COMPANY VEHICLE DOESN'T VIOLATE SURVEILLANCE LAWS

The evolution of modern technology keeps raising new legal issues affecting various aspects of our lives, including employment. One of the latest is the use of GPS systems in vehicles owned by employers but used by employees.

A fire inspector for the City of Bridgeport was brought up on charges when a GPS unit placed in the City vehicle he used in his job revealed that he frequently conducted personal business while he was supposed to be working. He brought suit in an attempt to block the imposition of any discipline, alleging violations of the Connecticut statutes prohibiting employers using any electronic surveillance to monitor employee activities "in areas designed for [their] health or personal comfort," and requiring posting of a written notice of any electronic monitoring of any employee activities.

A Superior Court judge ruled that the first statute was inapplicable, because it applied only to areas such as restrooms, locker rooms and lounges. The second statute presented a closer question. The judge considered the legislative history of the law, which included statements by lawmakers to the effect that it was not intended to apply to monitoring of areas open to public use. She also noted reference in the statute to the employer's "premises," which presumably referred to land and buildings under the control of the employer, not public roads and highways.

The court looked to a Utah case from a few years ago, in which a school district employee was disciplined for conducting his own electrical contracting business while he was supposed to be working in the schools. A federal court rejected his claims that placing

IN SUMMARY:

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a GPS unit in the vehicle he was assigned constituted an invasion of privacy and an unreasonable "search." That court said there was no reasonable expectation of privacy while driving an employer's vehicle on public roads during working hours.

Although the cases discussed above involve public employees, their logic is equally applicable to the private sector. In fact, it is not unusual for large companies to install GPS systems in their delivery trucks, since it is the only means of knowing with any accuracy where they all are at any given time. There are no reported decisions in which this practice has been successfully challenged.

Our advice to Connecticut employers, however, is to include GPS systems in the required electronic monitoring posting, along with other monitoring ranging from the employer's computer system to magnetic card readers recording employees coming and going. Employee awareness of the use of GPS units will likely reduce or eliminate misuse of company vehicles, which may be more helpful in the long run than catching and punishing occasional offenders.

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COMMON NON-COMPETE PROVISION OVERTURNED

Many non-competition agreements contain clauses stating that if an employee violates the terms of the agreement, the duration of the prohibition is extended by the duration of the period during which the employee is violating it, or the period when the parties are litigating over whether or not there is a violation. Otherwise, the argument goes, the employer is deprived of the benefit it expected to receive under the agreement.

However, a Connecticut judge has ruled that the effect of such a provision was to unreasonably extend the duration of the non-compete requirement. Further, the court refused to exercise its discretion to revise the language to limit it to a reasonable duration. Instead, it struck down the extension clause entirely, ruling that the appropriate remedy for any breach of the non-compete was monetary damages, not an extension of its duration.

Important to the outcome of the case was the duration of the original non-compete agreement (two years), the fact that the extension provision would have lengthened the duration of the prohibition by a year or more due to the pace of litigation over the dispute, and the nature of the activity involved (employment recruiting). It isn't clear whether the result would be different under a different set of circumstances, but employers may want to reconsider blanket use of extension provisions in non-compete agreements.

Our opinion is that many employers use non-compete agreements in too many situations, and their prohibitions are often broader than necessary. In most organizations, very few employees are in a position to do significant damage to the company after they leave,

even if they go to work for a direct competitor. Blanket requirements that all new hires sign a non-compete agreement seem particularly unreasonable, especially if they apply even if the employee is laid off or fired.

EMPLOYEE DEPRESSION CAN BE DIFFICULT FOR EMPLOYERS TOO

If you know anyone who has dealt with depression, you know what a challenge it is. One of the things it takes from its victims is the will and ability to fight it. That's one of the reasons it's a challenge for employers too.

The first issue is identifying the problem. People with depression often don't announce it, and may not even know it. In a recent case involving Quest Diagnostics, where an employee claimed discrimination based on her depression, one of the key issues was whether a reasonable employer should have known she was depressed. Though she never told anyone, she sometimes cried at work, and had attendance issues that were otherwise unexplained. In this case, the court said the employer did not have "constructive knowledge" that the employee suffered from depression, but some other cases have reached a different conclusion based on similar facts.

Assuming the employer knows about the problem, the next issue is what kind of accommodations it is obligated to make. If the employee needs to be out of work for treatment, FMLA may be available, but what about frequent absences on days when the employee just can't face getting out of bed? What if the employee comes to work, but performs at a substantially reduced level? A senior manager at Sikorsky Aircraft recently convinced a judge that his depression was serious enough to constitute a disability protected under the ADA, but because he was out of work 160 days out of the last year he was employed, the judge said he was not able to perform the essential functions of his job. Again, however, other cases have reached different results based on facts that were not very dissimilar.

In short, these are difficult cases, where reasonable people can differ over questions such as: Does the employee suffer from a disability? If the employee doesn't report it, should the employer nevertheless have been aware of it? Is the employee qualified to perform his or her job notwithstanding the disability? If accommodation is needed, how much accommodation is reasonable? The answers may depend on a variety of factors, including the nature of the employee's job, the employer's business, the employee's specific condition, etc.

Our advice to employers is not to draw medical conclusions on your own when an employee exhibits problematic attendance or performance without offering a medical explanation. Instead, inform the empoyee of the attendance or performance concerns, and explain about available EAP or medical options if he or she needs them. Then tell him or her that in the absence of a medical explanation for the attendance or performance problems, you will have to treat the problems as disciplinary in nature, and respond accordingly.

Recent S&G Website Alerts:

New FMLA Expansion, January 2008

E-Mail Policy May Be Enforced Against Union E-Mails, January 2008

Court Ends Insurance for Surviving Spouses, April 2008

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CONNECTICUT LAW REQUIRES ADA-TYPE ACCOMMODATION

Most employers are familiar with the principles of reasonable accommodation that apply under the Americans with Disabilities Act, but until now it has never been entirely clear that the same principles are applicable under Connecticut's Fair Employment Practices Act. Our Supreme Court has now ruled that they are. One of the most immediate consequences is that smaller companies with three to fifteen employees will have to play by the same rules as larger employers.

The case involved a warehouse worker for a liquor distributor who injured his back lifting cases of product. He was terminated after his doctor said he would likely never be able to lift more than 25 pounds safely. The employer's light duty policy said (as many such policies do) that light duty was only available to those recovering from injury, and that light duty could not be "permanent."

The parties fought over the matter in both federal and state courts. In the latest round, the employer argued that ADA principles of reasonable accommodation, including the duty to engage in an "interactive process" of exploring possible accommodations with the employee, don't apply under state law. The Connecticut Supreme Court rejected that claim, citing the remedial purpose of the statute, and the fact that the CHRO had long held the position that the same rules applied. The justices were not moved by the fact that the General Assembly had considered adding reasonable accommodation language to the law and had failed to do so.

It is not clear what the final outcome of the case will be, because the Supreme Court remanded it to the lower court for further proceedings. The employer will claim it has already gone out of its way to accommodate the plaintiff and that the "interactive process" shouldn't be allowed to drag on indefinitely. The plaintiff will argue that the company shouldn't be allowed to take any form of permanent accommodation off the table.

Our opinion is that this last point may ultimately be more significant than the one the Supreme Court just decided. Many employers assume that accommodation must by definition be limited in duration to be reasonable. It will be interesting to see whether accommodation is ultimately interpreted more broadly under Connecticut law, which applies to employers with three or more workers, than under the ADA, which is applicable to companies with 15 or more employees.

LEGAL BRIEFS

. . . and footnotes

Foxwoods Fights the Odds: In our last issue, we reported on the union election at Foxwoods Resort Casino, which the UAW won after the NLRB rejected the casino's claim that the agency had no jurisdiction over the Mashantucket Pequots as a sovereign nation. Recently the casino settled several unfair labor practice charges filed against it during the election campaign, and made whole two casino workers allegedly suspended for engaging in protected union activity. However, the casino has not dropped its own objections to the election, including its jurisdictional argument, even though most observers think it is a long shot.

Good Cause to Quit? Everyone knows that unemployment compensation will be denied to an employee who voluntarily resigns without "good cause attributed to the employer." But that phrase isn't limited to situations where a claimant has been subjected to intolerable working conditions. A former bookkeeper for Yellow Cab was awarded jobless benefits when she quit several months after her employer changed its health insurance plan to impose a $2000 deductible, and refused her request for a raise to help offset the increased health care cost. A Superior Court judge upheld the Board of Review's conclusion that the insurance change should be treated the same as a pay cut, which also has been found to justify resignation.

EEOC Position on Medicare Stands: The U.S. Supreme Court has denied review of a federal appeals court decision upholding the EEOC's conclusion that the reduction or elimination of health insurance benefits for retirees who become eligible for Medicare does not constitute age discrimination. That means the EEOC's position is now the law of the land. Commentators had predicted that if the EEOC's position had been overturned, the result would have been a dramatic reduction in the number of employers that offered any retiree health insurance at all.

ALJ Rules UAW Violated Beck: Twenty years ago, the Supreme Court held in *CWA v. Beck* that unions had to offer members the option of having their dues reduced by the proportion of the union's budget that goes toward political and other non-representation expenses. However, there has been disagreement over whether unions can require members to periodically renew their election. An employee of Colt's Manufacturing in Hartford filed charges against UAW Local 376 because he was required to file for a Beck dues reduction every year. An NLRB administrative law judge had ruled in his favor, stating that the UAW did not demonstrate a business justification for its policy, especially since it does not require annual renewal of membership or dues checkoff authorization.

Front Pay is Mandatory: In one of the sequels to the long-running litigation over allegedly discriminatory promotional procedures in the New Haven Fire Department, a Superior Court judge has ruled that in cases where reinstatement of a successful plaintiff is not feasible, front pay is not only permitted, but is required in order to make the plaintiff whole. Like other forms of damages, however, the plaintiff must still prove them by demonstrating that he would have continued working if it were not for the discrimination, and he could not have found comparable employment elsewhere.

No Recovery of Excess "Draw": A judge has rejected an employer's attempt to recover commission amounts advanced to a salesman but not yet earned at the time of his termination. The employer unsuccessfully argued that an agreement to pay a "draw" against expected future commissions created an express contractual obligation for the employee to repay any advances exceeding commissions actually earned. The employer did not make an "implied contract" argument as an alternate basis for recovery, so it is unclear whether that theory might have been successful.

Ministerial Exception Protects Church: Last year we reported on a case where an African-American priest claimed discrimination when he was not selected as the parish administrator. The trial court said churches have the right to govern their own affairs without being subject to discrimination laws. Now a federal appeals court has upheld that decision based on the "ministerial exception," under which courts decline to review decisions of churches about clergy in order to avoid excessive government entanglement with religion.

Bee Sting Allergy: A meter reader for Connecticut Water Service convinced a federal judge that his allergy to bee stings was serious enough to constitute a disability under the ADA. His employer was willing to accommodate him by assigning him to other duties in warm weather, but fired him when he refused to read meters in the winter. It will take a trial to determine whether his requested accommodation was reasonable.

What Was He Thinking? A Metro North employee alleged he suffered post traumatic emotional distress after operating a train that backed over and killed a co-worker in Stamford. A federal judge threw out his claim because he was not even in the "zone of danger," was not harmed, was not in a position where he was likely to be harmed, and was not aware the other employee was killed until after the train came to a stop. What the judge didn't say, but must have been thinking, is that it took some nerve to bring this claim!

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