

# GPS Monitoring Of Employees In California: Do You Know Where Your Employees Are? Are You Allowed To Know?

With the advent of cost-effective GPS devices and smartphone tracking apps, employers may effectively monitor their workforce like never before. An employee's distance traveled, sales routes, and productivity (among other things) can now be verified in real time, which is a seductive thought to most employers, to say the least. But there are things to consider before using tracking technologies to monitor employees, such as constitutional rights of privacy, state criminal statutes, union and labor issues, and good old-fashioned tort claims. In this article, we'll review some legal considerations and provide some tips for navigating the evolving legal landscape of GPS tracking.

In California, the right to privacy is an express constitutional right. Article I, Section I of the California Constitution provides that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and **privacy.**" The California Constitution differs from the U.S. Constitution in this regard, even though a right to privacy has been extrapolated from various provisions of the U.S. Constitution. **The fact that the California Constitution makes the right to privacy explicit requires employers to give serious consideration to privacy issues in the workplace before taking actions that might expose them to liability.**

The issue of GPS tracking of employees is less established, and employers have little formal guidance on what practices are permissible and what are not. A good starting point for analyzing potential GPS

tracking practices is California Penal Code Section 637.7. That provision states: (a) *No person or entity in this state shall use an electronic tracking device to determine the location or movement of a person.* (b) *This section shall not apply when the registered owner, lessor, or lessee of a vehicle has consented to the use of the electronic tracking device with respect to that vehicle.* (c) *This section shall not apply to the lawful use of an electronic tracking device by a law enforcement agency.* (d) *As used in this section, "electronic tracking device" means any device attached to a vehicle or other movable thing that reveals its location or movement by the transmission of electronic signals.* (e) *A violation of this section is a misdemeanor.*

**Section 637.7 thus makes it illegal to monitor the movements of any person, including a vehicle owned by that person, without their consent.** Company-owned vehicles could presumably be monitored without the employee's consent, as long as the owner of the vehicle (the company) consents. However, notifying employees of such tracking (and even obtaining their consent to such tracking) is the safest practice given the still-developing legal landscape with regard to this issue, and particularly in light of new privacy laws going into effect, such as the California Consumer Privacy Act, discussed further below. Additionally, with regard to monitoring employees via smartphone apps or device tracking, providing clear notice and obtaining consent is generally considered best practices. (Although, it is subject to debate whether smartphone apps qualify as a "device" attached to the "telephone" for purposes of being subject to section 637.7.)

In addition to the penal code, **employers may be subject to civil tort claims for invasion of privacy based on their actions.** A civil claim for intrusion into private affairs requires: (1) an intentional intrusion “into a place, conversation or matter as to which the plaintiff has a reasonable expectation of privacy”; (2) “in a manner highly offensive to a reasonable person.” In order for GPS tracking of employees to meet this standard, employees would need to have a reasonable expectation of privacy regarding their location that is intruded upon in a “highly offensive” manner. Arguably, employees should not have an expectation of privacy when using company-owned vehicles during business hours or for work purposes. However, whether GPS monitoring of such vehicles constitutes a violation of privacy would require considering various factors, including whether the employee uses that company-owned vehicle regularly, parks it at his or her house during non-work hours, or uses it for personal reasons during off-work hours, among other things.

It is likely that monitoring the location of an employee during non-work hours or during the performance of non-work tasks – to say nothing of monitoring an employee’s own private vehicle – could be viewed as “highly offensive” to a reasonable person and a violation of an employee’s expectation of their privacy. Ultimately, determining whether any given practice constitutes an actionable violation of privacy requires a court to weigh various factors, including the nature and context of the alleged intrusion, as well as the reasonableness of the motives, purposes, and objectives for the disputed practice.

**Beyond statutory and tort liability, employers need to consider whether their employees belong to a union, or are subject to a collective bargaining agreement, some of which have specific provisions regarding privacy rights that might conflict with intended employer actions.** Employers should review any provisions of such agreements that may apply to their workforce and ensure that GPS monitoring of employees is not specifically prohibited by the agreement and that the employer’s contemplated practices are consistent with the privacy rights set forth in the agreement.

Finally, with the newly passed **California Consumer Privacy Act (“CCPA”)** going into effect on January 1, 2020, employers must consider the disclosure obligations and potential liability that come with GPS tracking of employees going forward. The CCPA gives California residents significant new data privacy access, disclosure, and deletion rights and does not distinguish between residents in their roles as consumers or employees. Thus, employees have the same rights as any consumer to request that a company (in this case, their employer) disclose how their personal information is being collected and used, and well as to obtain access to and/or deletion of that information. Because GPS tracking information collected about employees falls under the broad definition of “personal information” used in the CCPA, employers will be obligated to affirmatively disclose such collection practices at or before the point of collection, provide employees with a copy of that data upon request, and delete that data unless it is necessary to be maintained for a business purpose.

In sum, before venturing into the wild west of GPS tracking, the safest course for employers implementing GPS tracking is to:

1. Confirm there are no union issues raised by the tracking.
2. Provide written notice and obtain clear prior written consent from employees that the employer is tracking vehicle movements (regardless of whether the vehicle is company-owned or privately owned).
3. Limit tracking to strictly work hours and only for specific business purposes. The GPS should be shut off during personal hours or personal vehicle use.
4. Develop and adopt a written policy regarding employee monitoring/tracking that sets forth the justifications and limits for GPS monitoring, how the information will be used and stored, and consequences for disabling the GPS.

5. Limit access to the tracking information to personnel who have a clear business need to know that information.
6. Store any tracking information securely, but in a manner that can be quickly accessed and provided in response to employee requests for personal information under the CCPA.

The information in this article does not constitute legal advice with regard to the use of any GPS tracking or other employee monitoring practices. Please contact Litigation and Data Privacy partner Scott Hall at shall@coblentzlaw.com or 415.772.5798 or Corporate partner Brandi Brown at bbrown@coblentzlaw.com or 415.772.5797 with specific issues or questions.



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