

New Jersey and New York Impose New Notice Requirements Regarding Employer Monitoring

by Beth P. Zoller

With advances in technology, it has become increasingly easier for employers to track and monitor employees for legitimate business reasons, whether enhancing productivity and efficiency, ensuring compliance with safety laws, or investigating suspected unlawful conduct. However, employers in New Jersey and New York should proceed at their own risk, as new state laws place strict requirements on employer monitoring.

New Jersey Law

New Jersey employers should take note that effective April 18, 2022, Assembly Bill 3950¹ requires employers to provide written notice to employees when utilizing tracking devices, whether in a privately-owned or company-owned vehicle.

Specifically, the law provides that it will be a fourth-degree crime for an employer to track an employee using an employer-provided tracking device or electronic communications device without providing written notice to the employee. However, the law does not supersede regulations governing interstate commerce, including but not limited to, those that govern the usage of electronic communications devices as mandated by the Federal Motor Carrier Safety Administration. Under the law, “electronic communications device” means any device that uses electronic signals to create, transmit, and receive information, including a computer, telephone, personal digital assistant, or other similar device. An “employer” means an employer or employer’s agent, representative, or designee but does not include the Department of Corrections, State Parole Board, county corrections departments, or any state or local law enforcement agency or public transportation system, including but not limited to scheduled or charter bus transportation, whether operated by a public or private company. “Tracking device” means an electronic or mechanical device which permits the tracking of the movement of a vehicle, person, or device but does not

include devices used for the purpose of documenting employee expense reimbursement.

Employers who violate the law will be subject to civil penalty in an amount not to exceed \$1,000 for the first violation and \$2,500 for each subsequent violation, collectible by the Commissioner of Labor and Workforce Development in a summary proceeding pursuant to the Penalty Enforcement Law of 1999.²

Next Steps

In light of this new law, employers may want to consider drafting, developing and implementing a policy outlining the employer’s legitimate business reasons and justification for engaging in GPS monitoring. Employers may consider explaining to employees the extent to which they will be monitored: specifically, whether the monitoring will be conducted in a private or company-owned vehicle, whether and how employees should expect to be monitored, and how the employer will utilize and safeguard the data and information collected. The policy should also notify employees if they will face disciplinary action for disabling a GPS device without the employer’s authorization. If an employer engages in such monitoring, it may be best to limit GPS tracking to work hours only or when an employee is interacting in the context of their workplace duties and responsibilities. In doing so, an employer must be mindful of any collective bargaining agreements or other state laws which may impact this.

Additionally, employers should require both current and new employees to acknowledge receipt of the policy and notice. Further, employers should be sure to maintain adequate records of this document in an employee’s personnel file in case of a later lawsuit.

New York Law

In an age of advanced technology, vehicle monitoring is only one of the myriad ways employers seek to track and monitor employees. New York has taken

employer requirements one step further. Effective May 7, 2022, pursuant to Senate Bill 2628,³ an amendment to the New York Civil Rights Law, all private employers, individuals or entities, with a “place of business” in the state of New York will be required to inform all current employees as well as all new employees upon hiring if the employer “monitors or otherwise intercepts” telephone conversations, email, or internet access or usage “of or by an employee by any electronic device or system including but not limited to the use of a computer, telephone, wire, radio, or electromagnetic, photoelectronic or photo-optical systems.” This legislation does not apply to state or local government employers.

Specifically, employers must provide notice of such monitoring “in writing, in an electronic record, or in another electronic form,” and need to obtain written or electronic employee acknowledgment denoting that the employee knows they are being monitored. Employers also must post notice of electronic monitoring “in a conspicuous place,” such that it is “readily available” to employees subject to electronic monitoring.

There are some notable exceptions, as the law does not apply to processes “designed to manage the type or volume of incoming or outgoing electronic mail or telephone voice mail or internet usage.” The law also does not apply to either processes “that are not targeted to monitor or intercept the electronic mail or telephone usage of a particular individual” or processes that are “performed solely for the purpose of computer system maintenance and/or protection.”

The new law provides the New York Attorney General with the authority to enforce its provisions. It also sets maximum penalties of \$500 for a first offense, \$1000 for a second offense, and \$3000 for a third and for all subsequent offenses. As written, there is no private right of action under the law.

Next Steps

To comply with this new law, employers should review their electronic monitoring practices and procedures and consider the extent to which they conduct electronic monitoring of employees and whether such monitoring will be covered by the new law. Employers should also develop and distribute the required notices (whether standalone notices or part of an employee handbook) as well as acknowledgement forms (whether in paper or electronic form) to provide to current employees as well as new employees upon hiring as part of the onboarding process. Such notice also must be posted in a conspicuous place in the workplace. Employers must also set up a system to ensure that the acknowledgement forms are properly retained and stored to demonstrate compliance. Lastly, employers should make sure to review and update any other relevant employee handbook policies to comply with the law. ■

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Endnotes

1. Assembly Bill 3950, available at njleg.state.nj.us/Bills/2020/A4000/3950_R4.PDF.
2. P.L.1999, c.274 (C.2A:58-10 et seq.).
3. Senate Bill 2628, available at nysenate.gov/legislation/bills/2021/s2628.