

# Cameras, GPS and “Geofences”

## What’s An Employer To Do?



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**C**ameras, GPS and “geofences” have become hotter topics given the proliferation of electronic monitoring, phone cameras in the workplace (officially and unofficially), and recent or lesser-known legislation.

Let’s start with security cameras. Employers often are confused about what they can and can’t do with cameras in the workplace.

First, it is not illegal to place cameras in a workplace. Keep in mind, however, the distinction between audio and video recording. Pursuant to California Penal Code section 632, it is illegal to audiotape anyone’s voice without their consent. That’s why there is always an announcement on a phone call when it is being recorded (E.g., “This call may be monitored or recorded for security or training purposes.”). With cameras, if there is going to be audio recording, the employer must post or otherwise announce that the facility is monitored with both video and audio.

With video-only recording, the employer is not required to announce the presence of the camera. For example, a “hidden camera” to catch an office thief is not per se illegal. Nevertheless, there are restrictions. Cameras may only be placed in areas where there is “no expectation of privacy.” Areas that would be fine to record are hallways, walkways, other common areas such as break rooms, kitchens, indoor or outdoor common eating areas, reception areas, a common area with individual open work cubicles, indoor or outdoor warehouse facilities, storage or staging yards, and parking lots. What would not be acceptable to record would be a changing room, locker room, restroom, or an individual office. One exception to an individual office might be a private locked room in which the company safe or other valuable information is located. If that were the case, then the company would need to announce the presence of a camera in that location.

One of my favorite cases was an employee who management knew was disgruntled. One day he began yelling from the break room that he had fallen and couldn’t get up. Co-workers found him lying in a pool of coffee that had been spilled earlier; a classic slip-and-fall. The employee had forgotten, however, that the company recorded the break room. We found an excellent video of him pouring coffee on the floor and then carefully lying down in the puddle.

Employers need to talk to their video recording vendor or whoever runs that feature for them. Video generally is only saved for between seven and 30 days. It is expensive to maintain it in the cloud, so it is not saved indefinitely. Also, in my experience, color video may be saved in a compressed format, and only in black and white, because it takes up far less bandwidth in that configuration. Once compressed, the original cannot be resurrected. We found in that format we could not zoom in on a specific movement or action that we wanted to watch (theft of money out of a jacket pocket, e.g.).

A corollary to the camera issue is an employee using a cell phone to record a conversation during a disciplinary meeting, termination meeting, or any situation in which an employee may place their phone on a desk during such a meeting. The employer has the right to instruct the employee to put the phone away, take it out of the room, or whatever else stops the behavior. No one has the right to record such a conversation and I generally recommend that employers do not record such meetings. Similar, during witness investigations, I do not record the conversation. I just take notes on my computer. I think we get a more candid response by the employee if they know that they are not being recorded.

Another corollary is the GPS tracker on vehicles. If a company owns a vehicle in California, the company is allowed to place a GPS tracker on the vehicle, and can even put a camera inside the cab, so long as it discloses the cab camera (as there would be an expectation of privacy in the cab, otherwise). Companies may not put a GPS tracker on an employee's private vehicle. In addition, there is some confusion over a recent California law that prevents the use of "mobile tracking devices" for tracking movement of another person. This issue comes up with phone-based apps for timekeeping systems. Employees typically use the app on their personal phones to clock in and out. Typically, the timekeeping app will track the employee's location while the app is activated. That feature can be deactivated, and it appears that the tracking might only occur at the moment the employee is clocking in and out. The California case law on this point suggests that would be legal. This issue also arises with the electronic "geofence" option. Geofences are used by employers at construction sites, for example. Workers clock in and out on their phones, but the geofence prevents them from doing so outside of a certain radius immediately outside the construction site. The geofence prevents employees from, for example, clocking in 10 minutes prior to arriving at the site or clocking out 10 minutes after departing and they are 2-3 miles away.

Employers are also entitled to track computer use with keystroke tracking software. Employee do not have an expectation of privacy with company computers, so company policies should reference that fact.

Some employers are complete idiots, like one of my client's (now former) co-owner. One of the women questioned what the little electronic gizmo was in the women's restroom. This co-owner said it was an inoperative camera and he professed not to know why it was there. It turns out, however, that this owner had placed the camera in the women's restroom and was live-streaming the video on his desktop computer in his private office. Trouble ensued.

We have also had a couple of situations in which employees were wearing glasses with cameras attached. These devices are readily available on the retail market. Employers may instruct employees not to wear or use such devices in the workplace.

In summary, employers should have clear "cameras in the workplace" policies to ensure that both the company and employees are observing appropriate protocols established by the company, as well as staying within the laws that continue to evolve as the technology becomes ever-more sophisticated.