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MANAGEMENT RIGHTS

A Labor Relations newsletter for clients of ROEMER WALLENS GOLD & MINEAUX LLP designed to provide relevant information to public sector managers on matters relating to the labor relations environment in government.

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USE OF GPS IN MUNICIPAL VEHICLES

The selection of equipment to be used to provide services to the public is within an employer's management prerogative and is thus, a non-mandatory subject of collective bargaining. This includes decisions to use GPS-enabled equipment. The manner in which the employer uses this equipment should be tailored to avoid implicating other interests which are mandatorily negotiable, such as employee privacy, employee use of a vehicle during off-duty time, increases in employee participation in recordkeeping, and disciplinary considerations. Use of the information gathered by GPS devices constitutes a "search" and is arguably subject to Constitutional limitations; however, such searches are lawful under what is known as the "workplace" exception to warrant and probable cause requirements when conducted for a "non-investigatory, work-related purpose," or for the "investigation of workplace misconduct," so long as the search is justified at its inception and reasonably limited in scope.

PERB has held that the selection of equipment to be used by employees to provide services to the public involves "the manner and means by which [an employer] serves its constituency and hence, is a management prerogative." *City of New Rochelle*, 10 PERB ¶ 3042 (1977). More recently, and as previously reported in the Winter 2009 issue of Management Rights, PERB has applied that precedent to employer-issued GPS equipment. In 2008, a PERB Administrative Law Judge ("ALJ") ruled on a trio of cases (the "2008 PERB GPS cases") regarding the use of GPS equipment in employer-issued cell phones and employer vehicles. *County of Nassau,* 41 PERB ¶ 4552 (2008) (use of GPS in employer-issued vehicles non-mandatory); *Village of Hempstead,* 41 PERB ¶ 4554 (2008) (use of GPS in employer-issued vehicles non-mandatory); *County of Nassau.* 41 PERB ¶ 4553 (2008) (use of GPS in employer-issued cell phones non-mandatory). In all three cases the ALJ held that the central issue is an employer's determination to use certain equipment. Thus, it was not a mandatory subject of bargaining. As explained by the ALJ in each of the 2008 PERB GPS cases:

> [T]he equipment to be utilized may be determined unilaterally by an employer. As applied to this matter, the utilization of GPS technology allows the [employer] to be aware of the location of its property, and the location of its employees on work time. The utilization of this equipment also has an effect on the productivity and efficiency of the workforce. These factors show that the utilization of GPS technology relates to the manner and means by which an employer is providing services to the public. Therefore, … there is no bargaining obligation concerning the decision to use it. *Id.*

While the installation and use of GPS-enabled devices is non-mandatory, such a decision has the potential to implicate several independent subjects which could trigger a bargaining obligation. These areas, as addressed by the ALJ in the 2008 PERB GPS cases, include: employee privacy, interference with an employee's use of off-duty time, increased employee participation in recordkeeping and employee discipline. *Id.* Although the ALJ was not persuaded that any of these bases were present on the facts of those three cases, they may be relevant under other varying fact scenarios.

Privacy – In the 2008 PERB GPS cases the ALJ dismissed the union's general privacy argument, citing the fact that "privacy rights are no more compromised in this matter than if an employer assigned a supervisor to accompany an employee on a specific job assignment, a prerogative which an employer possesses." *Id.* The ALJ was unpersuaded by the union's analogy to cases involving intrusion into an employee's personal belongings, private information or the integrity of a

person's body. (The cases cited by CSEA involved work rules relating to the inspection of vehicles or parcels, the release of medical information, and drug testing.) *Id.* Accordingly, there would be no privacy intrusion were an employer to monitor the location and use of its equipment through the use of GPS devices.

Use of Off-Duty Time – Whether the use of GPS technology inappropriately infringes on an employee's use of off-duty time may depend on the terms of the policy implementing this technology. In the 2008 PERB GPS cases, the ALJ found that the use of GPS did not infringe on this independent interest. *Id.* In the vehicle cases, the GPS remained on at all times, but employees were allowed to leave the GPS-enabled vehicles during lunch and break times. In one case, the employees took the vehicles home after work, and in the other the vehicle was returned to a work location while the employee was off-duty. In both situations, the ALJ ruled that the employer retains an interest in knowing the location of its equipment at all times, regardless of whether the employee assigned to it is on or off duty. In the cell phone case, the employees were permitted to turn the GPS-enabled cell phones off during lunch and breaks, which the judge found sufficient to avoid infringing on the use of off-duty time. The case does not discuss whether the cell phones or the GPS therein remained on while the employee was off duty. (See, *Cunningham v. NYS DOL*, discussed under "Federal and State search and seizure considerations.")

Increased Participation in Recordkeeping - The 2008 PERB GPS cases also addressed the issue of increased participation in recordkeeping. In order to avoid triggering a bargaining obligation, the employer should avoid requiring additional participation from the employees when implementing GPS-enabled equipment. An increase in employee participation in recordkeeping is a mandatory subject of bargaining. *Newburgh Enlarged City Sch. Dist.*, 20 PERB ¶ 3053 (1987) (holding implementation of a time clock calls for increased employee participation in recordkeeping by requiring employees to punch in, and is, therefore, a mandatory subject of bargaining). However, the bargaining obligation is only triggered if the employee is required to perform additional acts, and is not triggered simply by an increase in the information available to the employer based on the technology itself. *County of Nassau*, 41 PERB ¶ 4553 (2008) (the employer was not requiring more participation from employees than it had previously where the employees were already required to carry employer-issued cell phones at all times and complete detailed chronological itineraries of their movements throughout the day); *Village of Hempstead*, 41 PERB ¶ 4554 (2008) (employer was not requiring increased participation where employees assigned GPS-enabled vehicles were still required to clock in and out at a central work location and were not required to turn the GPS on or off at any time). Thus, the fact that more information would be available from the GPS devices than is currently available to the employer does not trigger the employer's bargaining obligation, since increased employee participation was not an element.

Employee Discipline - An employer's ability to use GPS information to take disciplinary action against employees does not create a bargaining obligation *per se*, but may be the subject of a demand to bargain impact. The fact that a work rule may have a disciplinary component does not create a bargaining obligation. *See, e.g., County of Nassau*, 41 PERB ¶ 4553 (2008), citing GOER, 18 PERB ¶ 3064 (1985) (unilateral implementation of a parcel inspection system with a disciplinary component does not violate the Taylor Law). This does not foreclose a union from making a demand to bargain the impact of the work rule and the information and implications which arise under such a rule.

Federal and State Search and Seizure Considerations - Both the United States Supreme Court ("Supreme Court") and the New York State Court of Appeals ("Court of Appeals") have held that use of a GPS device to track an individual's whereabouts constitutes a search subject to limitations under both the New York State and Federal Constitutions. *U.S. v. Jones*, 132 S. Ct. 945 (2012); *People v. Weaver*, 12 N.Y.3d 433 (N.Y. 2009). In addressing this issue in relation to government employers, the Supreme Court has noted that "special needs, beyond normal needs for law enforcement" make the warrant and probable cause requirements impracticable when applied to government employers, and established a workplace exception to these requirements. *O'Connor v. Ortega*, 480 U.S. 709 (1987). Thus, when conducted for a "non-investigatory, work-related purpose" or for the "investigation of workplace misconduct," a government employer's warrantless search is reasonable if it is "justified at its inception" and if "the measures adopted are

reasonably related to the objectives of the search and not excessively intrusive" in light of the circumstances giving rise to the search. Id. The Court of Appeals has held that this standard applies under the NY Constitution as well. *Caruso v. Ward*, 72 N.Y.2d 432 (N.Y. 1988).

The Court of Appeals affirmed that the exception extends not only to the workplace itself and employer-issued equipment, but may even extend to encompass private employee vehicles when those vehicles are used for business purposes. *Cunningham v. New York State Dep't of Labor*, 21 N.Y.3d 515 (N.Y. 2013). In *Cunningham*, the state Inspector General attached GPS to a Department of Labor employee's personal car to investigate alleged unauthorized absences from duty and falsification of records to conceal those absences. Id. The evidence obtained was used to bring disciplinary charges. *Id*. The Court of Appeals held that when an employee uses his personal vehicle during the work day, GPS tracking of that vehicle falls within the workplace exception. *Id*. However, the Court of Appeals found the search in this case to be unreasonable because the employer made no reasonable effort to avoid tracking the employee during non-business hours. *Id*. The device tracked the car during off-duty hours, weekends, and during a planned family vacation. *Id*.

The Supreme Court has not clearly settled the extent to which an employee's expectation of privacy in their workplace or employer-issued equipment factors into the *O'Connor* analysis. However, notice to employees of how employer-issued equipment will be used to monitor them is a relevant factor in the privacy inquiry. The Supreme Court's ruling in *City of Ontario v. Quon*, 560 U.S. 746 (2010) illustrates how the reasonable expectation of privacy inquiry may factor into the analysis. In *Quon*, a government employer audited text communications on the employer-issued pager of employees who exceeded the allotted character limit to determine whether it was necessary to raise the character limit to accommodate the employer's business needs. *Id*. The Court discussed what expectation of privacy the employee might have had in these text communications. *Id*. Statements made and written policies distributed by the employer regarding whether the messages might be audited was found to be a highly relevant factor. *Id*. The Court acknowledged that the extent to which the employee maintained a reasonable expectation of privacy in the messages was relevant to whether the search was overly intrusive. *Id*. Notice that the messages could be audited was again considered relevant to this inquiry. *Id*. In the end, the Court refused to issue a broad, general holding concerning an employee's privacy expectations in employer-provided technology. *Id*. It instead found that even if the employee had a privacy expectation, the search was nonetheless reasonable. *Id*. The Court found that the search was justified at its inception based on the "non-investigatory, work-related purpose" of determining the proper character limit and ensuring the employer was not paying for extensive personal conversations. Id. The search was found to be reasonably limited in scope because the employer sampled only two months for review, even though the employee had gone over his character limit during several additional months. Id. The employer subsequently referred the matter to an internal investigator to conduct a workplace misconduct investigation, but only after redacting the off-duty portions. *Id.*

Disclosure of GPS Information - As a final note, employers seeking to install GPS devices in police vehicles should be aware that they may be required to disclose GPS-gathered information in certain circumstances. GPS records for police vehicles may be subject to subpoena in a judicial proceeding. *See, e.g., People v. Campanella*, 899 N.Y.S.2d 526 (Dist. Ct. Suffolk Cnty., 2009.) In *Campanella*, a defendant charged with driving while intoxicated successfully subpoenaed the GPS records from the municipality for the patrol vehicles involved in the investigation and arrest, over the municipality's objection. In granting the subpoena, the court noted that "the fact that the police department may have intended these records to be internal does not obviate their potentially exculpatory nature." *Id*. GPS records may also be subject to disclosure under NY's Freedom of Information Law ("FOIL"). The Committee on Open Government has advised that generally, GPS information for marked police vehicles should be disclosed under FOIL. FOIL-AO-18602 (July 28, 2011.) There may be more limited circumstances in which the information could be withheld. *See, e.g., Id*. (GPS information for unmarked police vehicles could be withheld under the FOIL exception for records which could "endanger the life or safety of any person" or "records compiled for law enforcement purposes and disclosure would interfere with investigations or criminal proceeding.")

Conclusion - A public employer may proceed with

the installation and implementation of GPS-enabled devices (cars, cell phones, etc.) utilized by its employees. In order to avoid triggering bargaining obligations, the employer should pay particular attention to ensuring that there is no intrusion into employees' privacy rights or off-duty time, and that employees are not required to undertake an increased role in recordkeeping. The employer should also advise employees of any new policy regarding GPS monitoring, and of the potential for disciplinary action based upon the information gathered. The employer should be aware that under PERB precedent, the union may make a demand to bargain the impact of a work rule relating to the GPS and the information and implications which arise under such a rule. The employer should further be aware that they may be required to disclose GPS records, in certain circumstances, if subpoenaed in a judicial proceeding or if requested under FOIL.

SUMMARY OF NEW FMLA FINAL RULE RE: SAME-SEX SPOUSES

The U.S. Department of Labor (DOL) recently issued a new final rule which expands protections for same-sex spouses under the Family Medical Leave Act (FMLA.) The new rule, which became effective March 27, 2015, revises the definition of a "spouse" under the FMLA. The new rule (a "place of celebration" rule) requires employers to look to the law of the state where a marriage was entered into, as opposed to the law of the state in which the employee resides, to determine whether the marriage qualifies the spouse under the FMLA. The definition of spouse now includes an individual in a same-sex or common law marriage that either was validly entered into in a state that recognizes such marriages, or was validly entered into outside the U.S. which could have been entered into in at least one U.S. state.

Previously, the FMLA applied a "state of residence" rule, under which only employers in states which allowed same-sex marriages were required to treat both same-sex spouses and opposite-sex spouses equally for purposes of FMLA eligibility and application. Employers in states which do not recognize same-sex marriages were not required to recognize spouses of same-sex marriages entered into in a jurisdiction which allows them.

The definitional change means that eligible employees in same-sex marriages will be able to take FMLA leave to care for their same-sex spouse with a serious health condition, take qualifying exigency leave due to their same-sex spouse's covered military service, or take military caregiver leave for their same-sex spouse. These protections still do not apply to same-sex couples who are not legally married (for example, same-sex couples in civil unions or domestic partnerships.) Employers should review their FMLA policies and procedures to determine if any changes are required in light of the new DOL rule.

HOLD THE DATE

The New York State Public Employer Labor Relations Association (NYSPELRA) Annual Training Conference will be held once again in Saratoga Springs: **July 22-25, 2015**.

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