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Companies: be careful when using the geolocation technology as a tool to monitor the working time of your itinerant employees

More and more companies use systems and devices enabling the geolocation of their employees. To address this issue, the C*ommission Nationale de l'Informatique et des Libertés* (French Data Protection Authority, hereinafter the "CNIL") adopted as early as in 2006 a recommendation relating more specifically to the implementation of devices designed to track motor vehicles (Deliberation n°2006-066 of March 16, 2006).

Since 2006, any geolocation/tracking device, if it takes the form of a computerized personal data file, must be subject to a prior declaration with the CNIL. Geolocation devices may, however, benefit from the simplified notification regime available on the CNIL's website www.cnil.fr: if such devices meet the requirements set forth by the CNIL, they can be notified by reference to simplified Standard n°51.

On the other hand, if the geolocation device does not meet all the requirements of the aforementioned Standard n°51, a so-called "normal declaration" will be required (e.g. geolocation of an employee – as opposed to his/her vehicle – through a mobile phone).

In 2010, the CNIL received almost 1,800 requests for authorization concerning vehicle geolocation devices.

In addition, just like for all other means implemented to monitor employees' activities, the company is subject to the following obligations:

- Before the filing of a declaration with the CNIL: the employer must consult with the Health, Hygiene and Safety Committee, the staff representatives and the Works Council prior to implementing any sort of geolocation device;
- After the filing of a standard declaration or simplified notification with the CNIL: the employer must inform individually each employee of the implementation of the device and the nature of the to-be-collected data.

Thanks to the geolocation technology that incorporates either GSM or GPS, the company can instantaneously locate its fleet of cars or trucks, track its staff members, follow-up the deliveries and detect any dysfunction or travel incident.

It is therefore materially possible to put under scrutiny an itinerant employee who works remotely. Yet, the tracking device must not become an electronic bracelet or "*a permanent "policing" of employees with a car*",

according to the very terms of the 2009 CNIL's activity report.

As such, to avoid any unjustified intrusion into the employee's privacy, the CNIL held, in the aforementioned 2006 recommendation, that the implementation of geolocation devices is only admissible for the following purposes:

- The security or safety of the employee, of the goods or the vehicle he/she is in charge of (employee working alone, cash transportation, etc.);
- Improved allocation of resources for services to be performed on scattered locations (emergency services, taxi drivers, tow truck fleet, etc.);
- The follow-up or invoicing of transportation services designed for people or goods, or the provision of services directly connected with the use of the vehicle (school bus services, road shoulder maintenance, snow clearance, motorway service patrols, etc.);
- **The monitoring of working time, when no other means are available**.

The CNIL specified that the use of a geolocation device cannot be justified "***when an employee is granted freedom in the organization of his/her travels (medical representatives, sales representatives, etc.)***".

Yet, this is precisely for this type of so-called "autonomous" employees that geolocation devices are increasingly implemented.

In a case it recently had to adjudicate, the *Cour de Cassation* (French Supreme Court) firmly endorsed the CNIL's recommendation that is too often ignored by companies.

In its decision dated November 3, 2001 *(n°10-18.036)*, the *Cour de Cassation* indeed issued a serious warning to companies inclined to use geolocation devices – which, incidentally, are indisputably quite helpful – to monitor the working time of their autonomous itinerant employees.

In this commented case, the employer had installed a geolocation device in the car of an itinerant salesman. The device was notified to the employee and to the CNIL and was claimed to have been implemented "*to improve the production process by performing an ex-post study of the business travels and to enable the management to analyze and optimize the time required for such travels*", in other words for the laudable purpose of optimizing the employee's travels.

Pursuant to his employment agreement, the employee was subject to a working time of 35 hours per week, was free to organize his work, subject to due compliance with the defined work schedule and to the preparation of a detailed and precise daily report (to be drafted on a form especially created for that purpose) supposed "to provide evidence of his activities".

One year later, the employee acknowledged the termination of his employment agreement and blamed his employer for having adjusted his remuneration (downwards) on the basis of the data collected by the geolocation device installed in the car.

The *Cour de Cassation* held that the company had unlawfully used the geolocation device, which was a fault sufficiently serious to justify the acknowledgment by the employee of the termination of his employment agreement due to a misconduct from his employer.

The *Cour de Cassation* seized this opportunity to establish the legal framework governing the use of geolocation devices for the purpose of monitoring employees:

"*But whereas, firstly, pursuant to Article L. 1121-1 of the French Labor Code, no one may restrict personal rights nor individual or collective freedoms when such restrictions are not justified by the nature of the task to be performed or are disproportionate to the intended purpose; the use of the geolocation device as a means to monitor the duration of the working time, which is lawful only when such monitoring may not be achieved by another means, is not justified when the employee is free to organize his/her work*.

Whereas, secondly, a geolocation device may not be used by the employer for purposes other than those notified to the CNIL and disclosed to the employees".

As such, the *Cour de Cassation* recalled and endorsed three principles directly derived from the deliberation issued by the CNIL in 2006:

- The use of a geolocation device as a working time monitoring tool is unlawful if such monitoring can be implemented by another means (e.g. submission of a daily report by the employee);
- In any event, the use of a geolocation device as a working time monitoring tool is not justified for employees who enjoy freedom in the organization of their work, i.e. so-called "autonomous" employees;
- Lastly, it is not possible to use the geolocation device notified to the CNIL for purposes other than those set forth in the declaration filed with the CNIL and disclosed to employees.

In the commented case, the company had obviously distorted the purpose of the device since it indicated that this device was designed to carry out an analysis in order to optimize the employee's business travels, not to monitor his working time.

By diverting the geolocation device in order to monitor the activities of its employees, the company was not only exposed to the payment of damages for dismissal without cause. Indeed, pursuant to Article 226-21 of the French Criminal Code, **using personal data for purposes other than those declared to the CNIL is punishable by 5 years' imprisonment and a EUR 300,000 fine**.

Consequently, the use of gelocation devices must be categorically excluded for all employees who have been granted total freedom in the organization of their business travels. It is, therefore, not possible to implement a geolocation device to monitor the working time of an itinerant sales employee.

This rule clearly applies to **employees subject to a so-called *forfait jours* working time scheme** (i.e. where working time is not counted in hours but is based on a fixed number of working days per year). Implementing a geolocation device to monitor the professional activities of such employees is incompatible with their status as "autonomous" employees and likely to challenge the specific legal regime that applies to

them. For employers, the submission by the relevant employee of an activity report remains in the end the only acceptable way that reconciles (i) their obligation to respect the employee's freedom to organize his/her working time and (ii) their obligation to monitor the employee's compliance with the maximum working time duration and rest periods and to control his/her workload.

Needless to say that the employer may neither geolocate employees falling within the *cadres dirigeants* (managing executives) employment category (i.e. this category of executives is not subject to any work duration) in order to control their working time.

Yet, this decision of the *Cour de Cassation* does not exclude the implementation of geolocation device for autonomous employees or managing executives insofar as such devices are merely aimed at ensuring the safety of these employees or of the goods they transport, or to improve the provision of certain type of services (tow trucks, emergency services, etc.).

For itinerant employees who are not subject to the so-called *forfait jours* mechanism, as well as for all others employees on business trips, the implementation of a geolocation system to record worked hours is theoretically possible insofar as the company has not implemented another system of working time monitoring and to the extent that **such monitoring may not be achieved by any other means**.

For example, the management of the working time of truck drivers may not be achieved through a geolocation device because trucks are already equipped with a digital tachograph (i.e. electronic on-board recorder).

In practice, the employees displeased to feel "spied" through this geolocation device can always claim the implementation of another monitoring system, such as the submission of a working time report that is customarily applied to employees subject to a *forfait jours* mechanism: **this means that the use of a geolocation device to monitor the employees' working time can in fact be deployed only rarely without the risk of exposing the company to a complaint from an employee objecting to the lawfulness of such device.**

And even if the geolocation device is implemented lawfully, the monitoring must be conducted in the least intrusive manner possible. The employee must, therefore, be offered the possibility to activate/deactivate the device himself/herself. He/she must also be granted the possibility to disable the geolocation at any time.

Further, the device must not collect data on the location of an employee outside the latter's working hours. Staff representatives must not be geolocated when acting in the framework of their functions as staff representatives.

This will undoubtedly dampen the enthusiasm of employers with a keen interest in new technologies who might already have downloaded a geolocation app on their smartphone…

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