

EEOC Tackles Employer Use of “Wearables”

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Have you heard of “wearable technologies”? You may not be familiar with this term, but you are probably already using devices like Fitbit, smartwatches, and more. Even police departments leverage this technology to solve crimes. These “wearables” allow their users to monitor their activities throughout the day, their mental or physical condition, and many other metrics. But can employers use the same technology to monitor employees’ workplace activity or implement proximity sensors that warn of nearby hazards?

How Employers Are Using Wearables

Employers are increasingly taking advantage of technology to monitor employees for various purposes, including:

1. What are your employees actually doing when the supervisor is not there?
2. Can you cut workers’ compensation costs by utilizing a smartwatch to monitor employees’ physical or mental condition in the workplace?
3. Can you use sensors that warn employees of nearby hazards?
4. Can you use Global Positioning Systems (GPS) devices to track your employees’ location?

These are just a few examples. However, yes, an employer can legitimately use most of these technologies. But we know there is always a “but...”

EEOC Concerns About Wearables and Discrimination

The “but” in this case is that employers need to be mindful of discrimination laws when using wearables. The Equal Employment Opportunity Commission (EEOC) is targeting employers to ensure that an employer has not violated any discrimination laws when using wearables.

The wearables that are of concern to the EEOC are those that can track an individual’s physical or mental condition, such as high blood pressure monitors or eye trackers. Employers need to be aware that if they are using such wearables, they do not run afoul of the Americans with Disabilities Act (ADA).

ADA and Disability-Related Concerns

The ADA requires employers to provide reasonable accommodation to individuals with disabilities. One of the very specific rules in the regulations is that an employer cannot make disability-related inquiries or medical examinations of all employees—not only disabled employees—unless the inquiry is job-related and consistent with business necessity.

Employers may be making disability-related inquiries if they direct employees to provide health information when they are using wearables, such as whether the employees use any prescription drugs or have a disability. But can employers still do so if the inquiry is job-related or consistent with business necessity? The EEOC opines that an employer may be justified in using wearables when assessing whether an employee’s medical condition poses a direct threat to their safety or the safety of others. It cautions, however, that in assessing whether an employee is a direct threat, the use of wearables is relatively limited.

Other Anti-Discrimination Laws and Wearable Technology

While the ADA immediately comes to mind when an employer is using wearables, the EEOC further cautions that the use of wearables cannot run afoul of other discrimination laws that prohibit discrimination based on race, color, religion, sex, pregnancy, childbirth, or related medical conditions, national origin, age, or genetic information. The EEOC gives the following examples:

- Using a wearable that detects fatigue and other information to infer that an employee is pregnant.
- Relying on data from wearables that produce less than accurate results for individuals with dark skin.
- Tracking an employee during a lunch break when the employee is taking a parent to a dialysis center, and then inquiring or conducting research about the purpose for the visit in a way that solicits genetic information (i.e., family history).
- Analyzing heart rate variability and skin temperature to infer or predict menopause.

EEOC’s Best Practices for Employers Using Wearables

Some final pointers that the EEOC gives to employers:

1. Understand what data the wearable collects, including accuracy and validity across different protected classes.
2. Understand how the data is stored.
3. Know how the data can be used in employment-related decision-making, including whether its use may have a disparate impact on protected employees.

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