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CLIENT ALERT

WEARABLE DATA DEVICES CREATE NEW WORKPLACE LEGAL CONCERNS

In an effort to combat rising healthcare costs, some employers have begun offering health plans that grant employees discounts on their insurance premiums in exchange for satisfying stated fitness goals. In order to facilitate these programs, employers have begun distributing wearable data devices, or “wearables” (such as those sold by [FitBit](#), [Garmin](#), and [Jawbone](#)) that collect data on the wearer’s movement, fitness level, and productivity. Although the use of wearables provides benefits to both employers and employees, the introduction of new technologies like these into the workplace can trigger legal concerns.

Discrimination

The use of wearable data devices in the workplace may lead to unanticipated discrimination charges if employers are not careful about how they use the health and fitness data collected by the devices. The Americans with Disabilities Act (“ADA”) and the lesser known Genetic Information Nondiscrimination Act (“GINA”) prohibit an employer from using knowledge of an employee’s disability or genetic history when making hiring and firing decisions. Consequently, if an employer were to learn of an employee’s disability or genetic condition through information collected by a wearable, and then terminate that employee, the collected data could be used as evidence of discrimination.

The Equal Employment Opportunity Commission (“EEOC”) recently stated that as part of its “Strategic Enforcement Plan,” beginning in 2017, it will look carefully at hiring and firing decisions based on information garnered from wearable data devices. Accordingly, employers need to craft transparent employment policies on the use of any collected information, and to ensure that supervisors follow these policies.

Privacy

The introduction of wearables into the workplace also presents issues of employee privacy because of the devices’ capability to collect private health information. If an employer were to collect private health data without the knowledge or consent of its employees, the employer could be liable for invasion of privacy. Employers should ask that employees consent to any data collection or might even consider having employees sign a waiver of liability before collecting data through a wearable device.

While wearable devices promote healthier lifestyles for employees, thereby reducing illness, absenteeism and other challenges for their employers, employers need to limit the use of devices

to data collection directly related to “a legitimate business justification.” By providing a justifiable business reason for the specific data collected and only collecting data consistent with that reason, employers both achieve their business goals and defend against privacy claims. Again, this is best accomplished by developing and following clear and transparent policies on the type of data that will be collected and used.

In addition, Massachusetts wiretapping and surveillance laws prohibit recording of any individual without his or her consent. Employers offering wearable data devices with recording capability should make it clear to employees that recording employees without their consent will not be tolerated, and should ensure that their employees are not being recorded by these devices.

Data Security

Any device that collects, stores, or transmits personal data is also at risk of a security breach or hacking. In one recent example, [FitBit was hacked and customers' personal information was stolen in January 2016](#). Accordingly, it is important that employers take steps to minimize the risk of hacking by encrypting the information collected by these devices, hiring a third party specialist in data security to manage the data, or using another available anti-hacking strategy.

For any questions about wearable data devices or other employment law concerns, please contact Attorney Paul Holtzman (PHoltzman@kb-law.com) or Attorney Jill Brenner Meixel (JMeixel@kblaw.com) at (617) 482-7211.