

Keep an Eye On Your Private Eye

By Maureen Minehan

You have an employee you suspect is faking a disability to qualify for leave. You hire a private investigator to find out how the employee is spending his time. The investigator gets caught placing an illegal tracking device on the employee's car. Could you be liable too?

As a recent case in Illinois shows, it's possible. Under some state laws, employers can be responsible if an investigator, acting as the employer's agent, commits a crime while carrying out the employer's business.

Intrusion on seclusion

In *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, 34 I.E.R. Cas. (BNA) 884, 162 Lab. Cas. (CCH) P 61296, 2012 WL 4950860 (Ill. 2012), Kathleen Lawlor, a former sales representative at North American, sued the company for "intrusion on seclusion," a tort claim akin to invasion of privacy.

Lawlor claimed that after her resignation, North American hired a third-party investigator to determine if she was violating a noncompete agreement she had with the company. When she found out the investigator obtained telephone records for both her home and cell phones by impersonating her with the phone companies, she filed suit.

After considering testimony that North American's attorney had asked for phone records and that North American executives reviewed the records, the Illinois court said North American could be held liable. "North American argued that the investigators

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were independent subcontractors, two steps removed from North American's control, and that the company could not be responsible for their actions because it did not direct the manner in which the investigation was conducted and no knowledge of how Lawlor's phone records were obtained. The court disagreed and held that it was reasonable for the jury to find North American vicariously liable for the actions of its investigators because the company specifically requested their

attorney to obtain the phone records and that North American could be deemed to have known that the records were not publicly available and would have to be obtained through improper means," Abiber Zanzi, an associate in the Chicago office of Franczek Radelet, explained in a client alert.

Still worth it?

Given the potential liability, is it still worth it to hire an outside investigator if you suspect employee misconduct? Zanzi says yes. "Employers have many legitimate reasons for conducting independent investigations of their employees and former employees, particularly if there is reason to suspect an employee is soliciting customers, misappropriating trade secrets, or otherwise engaging in gross misconduct."

Gregory Grant, a partner at Shulman Rogers in Potomac, Maryland, says potential expansion of the Family and Medical Leave Act (FMLA) could make investigations even more important to employers. "There is talk of expanding the FMLA to cover



employers with under 50 employees as well as part time workers. Employers are already concerned about FMLA abuse and any expansion of the law will likely increase their interest in investigations.”

External vs. internal investigators

Guido van Drunen, a principal with KPMG LLP in Seattle says there are several reasons to consider using a private investigator instead of internal resources to conduct an investigation. “The benefits include having access to a skilled resource on an ad-hoc basis; absorbing the cost of services only when you need their expertise; and gaining access to people in jurisdictions where you may not naturally have a presence. It also can ensure the investigative team is removed enough from the target of the investigation or inquiry to be objective.”

Federal requirements

Grant says employers’ ability to launch misconduct-related investigations and use third-parties to conduct them is not heavily regulated unless a credit check is involved. “The Fair and Accurate Credit Transactions Act (FACT), passed in 2003, established that as long as a credit check is not involved, employers have the right to conduct misconduct investigations without waiver or notice requirements.

It’s only if you take action based on the results of the investigation that you have to notify the employee of the investigation and provide them with a summary of the report you received from the investigator.”

“This doesn’t put a lot of restrictions on the employer so we get a lot of questions from employers unsure how far they can or should take an investigation.

They say ‘we don’t want to do anything wrong so how can we go about this appropriately?’”

Know your investigator

Zanzi says the solution is to conduct investigations as needed, but exercise caution. “It is prudent to learn how an outside investigator intends to conduct an investigation to ensure that that the employer is comfortable with the approach. At a minimum, employers should set forth clear expectations of

what is acceptable and unacceptable conduct in their retention agreements with the investigator.”

Grant agrees. “You need to have control and knowledge about who the people conducting the investigation are. Really make sure you know who you are working with and be very clear about what you want them to do.”

“You need to remember that you can outsource the work, but not the responsibility. You should have a clear contract with do’s and don’ts. You are not absolved from sin if your contractor does something inappropriate or illegal,” van Drunen says.

Have a business justification

News reports indicate there’s growing demand in some industries for ongoing monitoring of employees by third-party investigation firms even when no wrongdoing is suspected. A recent NPR story highlighted work done by K-2 Intelligence, a New York-based “corporate monitoring” firm, for a client concerned about the potential for inside trading. Matt Unger, a K-2 employee, demonstrated the company’s monitoring software for an NPR report.

“We see that this guy Kevin all of a sudden started calling the 410 area code where he never did that before, and he stopped answering emails—he’s being less responsive to his peers,” Unger said, pointing at a group of statistics clustered under the individual’s name. “What has he got cooking on the outside that he’s spending so much time on the phone and he’s not able to answer his peers?”

Unger told NPR that he was looking for sudden changes in behavior. While the changes don’t necessarily mean something is amiss, they act as red flags that might warrant further scrutiny. Van Drunen says employers should make sure they have a legitimate business reason to conduct such monitoring.

“Monitor is a very broad term. We should always start with the premise that there is a right to privacy and tread carefully. It is generally not a good process to just monitor employees for no reason.”



The bottom line

Employers must take steps to ensure any private investigator they use acts lawfully on their behalf to avoid potential liability.

“As the Lawlor decision demonstrates, employers may not be able to shield themselves by turning a blind eye to an investigator’s methods, as a court may view the investigator as an agent of the employer,” Zanzi says.