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WEARABLE TECHNOLOGY IN THE WORKPLACE

MODEL GUIDELINES FOR THE USE OF ARTIFICIAL INTELLIGENCE

CROSSING THE RUBICON

What the Proposed Rewrite of Uniform Guidance Means

Wearable Technology in the Workplace

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In 2026, we drive alongside driverless cars, have food delivered to us by robots, and can use eyeglasses to record audio and video. As the uses for technology grow, employers, regulators, and policymakers struggle to keep up. "Wearable technology" is a recent trend, with users able to wear technology as watches, eyeglasses, trackers, rings, and other tech, sometimes without the knowledge of co-workers or supervisors. Certain wearable technologies are embedded with sensors and worn on the body to track bodily movements and/or location, or to collect biometric information. Moreover, rapidly evolving technology enables users to surreptitiously

record audio or video using eyeglasses, smartphones, smartwatches, and smart rings. Privacy advocacy groups recently issued a letter to Mark Zuckerberg saying that wearable technology represents a "dystopian privacy invasion" that is "a serious threat to privacy and civil liberties for every member of our society."[1] Regulators and policymakers are getting involved as well.

The Equal Employment Opportunity Commission ("EEOC") and the National Labor Relations Board ("NLRB") have issued warnings to employers and legislators about the risks of allowing wearable technology in the workplace without first adopting appropriate policies to protect employees. The EEOC warned that any wearable technology that collects information about an employee's medical status (such as blood pressure monitors) and provides that information to the employer may violate the Americans with Disabilities Act ("ADA"). The EEOC opined that employer-issued wearable technology of this type could be classified as conducting "medical examinations" or making "disability-related inquiries" in violation of federal law.[2] Moreover, the NLRB expressed concerns about employers recording employees engaging in "protected activity," thereby eliminating an employee's ability to keep that information confidential from the employer.[3]

Additionally, there are privacy concerns regarding the continuous or intermittent audio and visual recording of employees without consent when the wearable technology records areas where employees and members of the public have a reasonable expectation of privacy. Agencies should also consider that when employees record interactions with the public, they are creating public records because these recordings contain information relating to the conduct of the public's business. One additional consideration is that municipalities may be required to meet and confer with employee associations regarding the effects of such a policy prior to adoption. The employee associations will likely want to negotiate issues regarding how this use or policy will impact discipline, when information cannot be recorded, and how the recorded information will be retained by the municipality, among other potential employee concerns.

This article discusses these concerns and suggests ways to address the potential impacts of wearable technology in the workplace. Although simply prohibiting the use of such technology in the workplace may seem intuitive, the proliferation and rapid development of wearable technology may make that impractical.

Title VII and the ADA

Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act, prohibits discrimination based on pregnancy, childbirth, or related medical conditions. The ADA prohibits discrimination against an applicant or employee based on a disability. These federal statutes provide a framework for federal agencies' evaluation of these issues.

The EEOC expressed concerns that wearable technology, provided by an employer or required to report to an employer, may collect data that constitutes a "medical examination" or a "disability-related inquiry." A "medical examination" under the ADA is a procedure or test that seeks information about an individual's physical or mental impairments or health. The EEOC's guidance on Pre-employment Questions and Medical Examinations lists the following factors that should be considered to determine whether a test (or procedure) is a medical examination: (1) whether the test is administered by a health care professional; (2) whether the test is interpreted by a health care professional; (3) whether the test is designed to reveal an impairment or physical or mental health; (4) whether the test is invasive; (5) whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task ; (6) whether the test normally is given in a medical setting; and, (7) whether medical equipment is used.[4] A "disability-related inquiry" is a question (or series of questions) that is likely to elicit information about a disability. "Disability-related inquiries" may include: (1) asking an employee if they have a disability, how they became disabled, or about the severity of the

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disability; (2) asking about an employee's genetic information; or (3) asking an employee whether they are currently taking or previously took any prescription drugs or medications, or monitoring an employee's taking of such drugs or medications.[5]

Practically speaking, the use of wearable technology to monitor an employee's surroundings could fall under either prohibition, depending on the technology's purpose and use. Obviously, any technology that reports medical data to the employer raises concerns. In addition, employees may inadvertently capture, through video or audio recording, another employee taking prescribed medication, taking a physical break, or looking at medical documents while at work. An employee's constant surveillance may expose another employee's physical or physiological ability to perform tasks. This would be impossible to monitor completely, and the retention of the data recorded would need to be closely monitored. Given the number of employees and their potential health conditions, the likelihood of concern being recorded on an employee's wearable technology is significant.

There are currently no cases on point related to disability discrimination against an employee based on data compiled from wearable technology. The technology is new, and its presence in the workplace is still rare. However, in *Nawara v. Cook County*,[6] the Seventh Circuit considered whether an employee–who never claimed he was disabled or perceived as disabled—was entitled to damages for being required to undergo a medical examination. The employee filed suit against his employer alleging that the medical examination violated the ADA because it was not job-related and consistent with business necessity. On appeal, the Seventh Circuit found that employees can establish a violation of the ADA even if they are not disabled or perceived as disabled. Having proven that the ADA was violated, the appeals court ruled that the employee was entitled to recover back pay.[7] This Seventh Circuit decision demonstrates the potential risks associated with the employer's use of data collected by wearable technology, if the data is used to determine whether a person has a disability or if recording is deemed a "medical examination" under federal or state law.

In *Doe v. Kohn Nast & Graf, P.C.*,[8] an attorney infected with a disease sued his employer for searching his office and discovering a letter containing information about his disease. The United States District Court of Pennsylvania, Eastern District, determined that there was a genuine issue as to the attorney's cause of action related to a medical inquiry, so that summary judgment was not entered against the attorney on that claim. The District Court emphasized that the ADA prohibits an "employer's inquiries of an employee as to whether such an individual with a disability or as to the nature or severity of the disability." This prohibition includes the alleged search of the attorney's office after the employer became suspicious of his illness.[9]

These cases demonstrate guiding principles suggesting that courts will likely view the surveillance of employees using wearable technology as a "medical examination" or a "disability related inquiry."

Protected Union Activity

Employees have a reasonable expectation of privacy in the workplace and, in many states, the right to engage in union activity. If wearable technology is permitted only in publicly accessible areas, or in an "open area," this will reduce an employee's reasonable expectation of privacy. However, the permitted use of wearable

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technology in the workplace likely is a meet and confer matter under the local laws governing public employee association relations because the recording of employees may affect working conditions of association members, including performance evaluations, potential discipline, privacy in locker rooms, privacy in personal conversations in break areas, discussions about union activity, and supervisor interactions, which are matters within the scope of representation.

While there is no NLRB decision on point, current court decisions suggest that agencies should notify employee associations before finalizing a policy allowing wearable technology.[10] The employer permitted surveillance of employees engaged in protected activities such as passing out bills of information and discussing union activity, which is an unfair labor practice.[11] One can easily see that wearable technology might be used in that context.

In *Snap-On Tools, Inc.*,[12] Snap-On Tools, Inc. violated the National Labor Relations Act by videotaping employees' hand billing at the plant gate, among other unfair labor practices. The manner in which the company recorded employees included altering the normal practice of panning the security camera to the parking area and manipulating it to point at the gate where employees were engaged in protected activity. Had the employer maintained its normal video practices and the video shots of protected activity been incidental to those practices, there likely would not have been a sustained unfair labor practice charge.[13] Thus, if protected activity occurs while employees are using permitted wearable technology and the activity is incidentally recorded, it might not be construed by a court as an unfair labor practice. However, the NLRB has not addressed the recording of protected activity through wearable technology, so there may be a cause of action if such recordings are used against employees engaging in protected activity.

Privacy Rights

The United States Supreme Court in *O'Connor v. Ortega* established that public employer intrusions on the privacy interests of government employees should be judged by the standard of reasonableness under all of the circumstances. To determine this reasonableness of searching a public employee, courts will use a two-part, multi-factor test articulated by the plurality opinion:

> "First, a reviewing court must consider "[t]he operational realities of the workplace" in order to determine "whether an employee has a reasonable expectation of privacy" there. Id. at 717, 107 S.Ct. 1492. Such determination is made on "a case-by-case basis." Id. at 718, 107 S.Ct. 1492. Next, where an employee has a legitimate privacy expectation, an employer's intrusion on that expectation "for noninvestigatory, workrelated [sic] purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." Id. at 725–726, 107 S.Ct. 1492.
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> The second test from O'Connor to determine whether a government employer has violated the Fourth Amendment rights of an employee is provided by Justice Scalia's concurrence. Under this test, the court asks if the government's search would be "regarded as reasonable and normal in the private-employer context." O'Connor, 480 U.S. at 732, 107 S.Ct. 1492 (Scalia, J., concurring)."[14]

While the use of wearable technology to record employees has not been fully litigated to a reported result, there are legitimate concerns that users may record employees while in areas where the employees have a reasonable expectation of privacy. For example, if an employee is using Meta Glasses, they may inadvertently - or intentionally - wear them into the restroom or locker rooms and record activities occurring in a normally private space without the knowledge of their co-workers. This would violate employees' privacy rights and expectations.

Crafting your Policies

A Public agency employer must consider whether it wants to allow these technologies in the workplace. One solution is to ban these items from the workplace, although it would be difficult to ban smartwatches and smartphones, as they are widely used. Banning devices like recording eyeglasses or other portable cameras and recording devices may be more practical. Conceivably, some employees may want to record interactions with members of the public or other employees; they might believe, to protect themselves. If the public agency decides to allow wearable technology in the workplace, these are some key considerations:

- Ban the use of the technology in specified locations such as restrooms, locker rooms, break rooms, lactation rooms, and areas where protected activity takes place.
- Advise employees that recordings from their personal devices may be subject to a public records request if those devices are used for public business.
- Work with the IT Department to screen these recordings in the event of a public records request to ensure private information is not disclosed.
- If the municipality provides wearable technology to employees, it should work with the IT Department to screen recorded and stored data in the system to delete private information, especially any medical information.
- Update your records retention schedule to delete this information at a scheduled period.

You should discuss these policy considerations with your agency's legal counsel to determine what protocols are best for your agency. This is a developing area of law that will likely change as fast as the technology evolves. Agencies will benefit from taking preventative measures now. ML

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Notes:

1. Coalition Letter to Meta Regarding Facial Recognition Feature, (Am. Civ. Liberties Union of Mass.) available at: https://www.aclum.org/publications/coalition-letter-to-meta-regarding-frt-feature/
2. U.S. Equal Emp. Opportunity Comm'n, *EEOC Highlights How Wearable Technologies May Implicate Employment Discrimination Laws*, 2024 WL 5234238 (E.E.O.C. 2024).
3. Jennifer A. Abruzzo, Gen. Couns., Nat'l Lab Rels. Bd., *Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section Rights*, Memorandum GC 23-02 (Oct. 31, 2022).
4. U.S. Equal Emp. Opportunity Comm'n, *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations Under the Americans with Disabilities Act of 1990*, 8 Fair Emp. Prac. Man. (BNA) 405:7191 (1995) [hereinafter *Preemployment Questions and Medical Examinations*]. https://www.eeoc.gov.
5. *Id.*
6. *Nawara v. Cook County*, 132 F.4th 1031 (7th Cir. 2025).
7. *Id.*
8. *Doe v. Kohn Nast & Graf, P.C.*, 866 F. Supp. 190, 3 AD Cas. (BNA) 1322 (E.D. Pa. 1994).
9. *Id.*
10. *Colgate-Palmolive Co.*, 323 N.L.R.B. 515 (1997); *Snap-On Tools, Inc.* 342 N.L.R.B. No. 2 (2004).
11. *Snap-On Tools, Inc.*, *supra*.
12. *Id.*
13. *Id.*
14. *O'Connor v. Ortega*, 480 U.S. 709 (1987).