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Employee Microchipping in the Brave New Workplace World

Jennifer B. Rubin

As *Corporate Counsel* recently reported, a Wisconsin tech company has implemented a program that allows its employees to have an RFID-enabled microchip surgically implanted in their hands. Once implanted, the chip allows the employees simply to wave their hands to open doors, purchase food and interface with the company's technology systems. This technology is not new — microchipping pets is standard these days, countries like Sweden have been experimenting with human chip implants for several years, and legislators have debated the efficacy of digitally tracking sex offenders and other felons through microchip implants. But implanting employees with microchips in our rigorously regulated workplace raises legal concerns. Employers eager to adopt this new technology in the workplace should be mindful of a few regulatory risks.

Is Anything Truly Voluntary in the Workplace?

While the Wisconsin company has apparently made clear to its employees that their participation in the chip program is voluntary, one questions whether anything is truly voluntary in the workplace. Coercion is inherent in the employer-employee

relationship because it is, after all, the employee's job to do what the employer tells the employee to do. Adding to this mix, several states (California, which is the usual suspect, but also Oklahoma, Wisconsin and North Dakota) have passed laws restricting anyone from compelling an individual to receive a subcutaneous implant. If a supervisor asks an employee to voluntarily participate in the program, isn't the answer naturally yes, at least for those employees who wish to get ahead in the workplace? In addition, the perception of reward to other employees for participating in the program likewise calls the voluntary concept into question. And the corollary to perceived benefits is that of implicit (or explicit) retaliation, a well established concept in today's workplace. If an employee refuses to participate because of the employee's health or privacy fears, what happens as a result of the next negative performance evaluation or the failure to meet the employee's compensation expectations? It is hard in the ordinary course to definitively defend

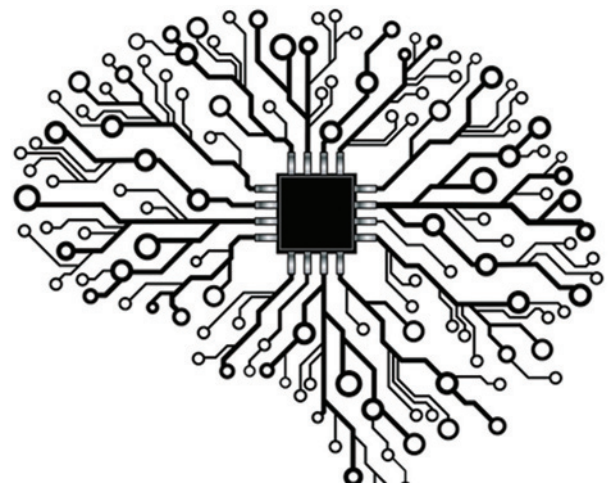


Illustration Human Microchip

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against retaliation claims; the chip opt-outs could make the retaliation defense even harder.

Can "Chip Refusers" Claim an At-Will Exception?

Another potential risk of the chip-rejectors is the creation of a class of employee who could potentially bring wrongful discharge claims based on the violations of public policy. While at-will employment is the default employment rule, the at-will rule erodes when a termination violates public policy. It is not out of the realm to claim that refusing to be chipped led, one way or the other, to termination (or constructive discharge) and therefore violates the public policy against

human medical experimentation. The use of a waiver seems obvious for the opt-ins (except for the workers compensation pitfalls discussed below) but it doesn't seem sensible to ask an opt-out to sign a waiver nor is it even clear such a waiver would be enforced because it would prohibitively waive future claims of wrongful discharge.

Is it Safe?

Safety concerns are paramount here. What happens if the chip dislodges, causes an infection, burns an employee during an MRI scan, or causes general humiliation when the individual can no longer pass through TSA security without a body cavity search? Federal and state OSHA laws require that employers provide a safe workplace for their employees. Medical experimentation might call these safety regulations into question if something goes wrong.

Who Pays if it Isn't Safe?

The natural corollary to the safety question is this: who pays if something goes wrong? Workers compensation of course generally bars most personal injury claims against employers, but it isn't clear that a voluntary microchip program should (or could) fall under this bar. Many workers' compensation schemes have exceptions for what is known as "dual capacity" employment — where an employer has separate legal obligations to an employee that do not arise from the employment relationship. An employee who claims injuries arising from a microchipping program may be able to successfully assert that exception — notwithstanding the presentation of a waiver with full factual disclosure (assuming, again, such a waiver would be enforced).

What Happens If an Employee's Body is Hacked?

A physically embedded microchip also adds an entirely new dimension to data breach concerns. It is common knowledge that the biggest cybersecurity risk comes from insiders — typically, but not always, employees — sometimes accidental, but also by design. A chipped employee is like the laptop computer left in the back of an Uber. Technology doesn't come with guarantees and if a chip is hacked or accidentally (or purposely) scanned, the employee becomes a walking data breach.

And Speaking of Privacy

The prospect of a walking data breach leads to another concern: what types of notices and disclosures does each jurisdiction require to provide to a chipped employee regarding electronic monitoring? Express consent for certain monitoring would seem obvious under the circumstances, but an employer considering chip implantation should consult the laws of those jurisdictions that require specific forms of monitoring notice (Delaware and Connecticut are two examples) before chipping employees who perform services there.

What Happens at Termination?

Until someone invents a chip that dissolves over time, a subcutaneous chip remains in place until it is surgically removed. But what happens when employment ends, whether at the behest of the employee or employer? If the chip remains, presumably steps need to be taken to deactivate it. In addition, the parties would have to reach an agreement regarding the costs of future

removal, if it became necessary. Even if there is no harm or medical issues identified at the time it is implanted, there can be no guarantee that future medical issues won't crop up. Under those circumstances, it would seem fair to impose those costs on the former employer.

The Obvious Benefits ... Despite the Legal Drawbacks

The appeal of microchipping to employers is obvious — in addition to forgoing pesky things like card keys and time cards, the employer remotely accesses all necessary information about the employee's whereabouts and activities as well as real-time information about use of the employer's technological systems. But the appeal could rapidly diminish in the face of employment regulations, as well as provoking the first off-the-clock lawsuit seeking overtime for services performed through implantable technology. It is a brave new workplace indeed.

Jen Rubin is a member in the Employment, Labor and Benefits Section at Mintz Levin. She leads a bi-coastal practice in which she crafts business solutions to legal problems facing corporations and executives.