
To: FCA International Contractors
From: FCA International Legal Counsel
Subject: Electronic Timekeeping and Union Challenges
Date: Sept. 8, 2021

Background

To help increase efficiency, contractors are often interested in adopting digital timekeeping systems, such as QuickBooks Time (formerly called “TSheets”), BusyBusy and Timesheetmobile. These services are digital applications (or “apps”) that are downloaded onto the employee’s personal or employer-provide cell phone.

Timekeeping apps allow workers to easily clock-in and clock-out while at a remote jobsite. What is more, these apps have additional features, such as: GPS tracking to ensure employees are onsite, real-time notifications of scheduling or jobsite changes and team management.

In the past, unions have resisted attempts by contractors to require members to utilize mobile apps for timekeeping and GPS tracking. For example, in 2019, a local union in Canada convinced a labor arbitrator that a contractor violated the parties’ collective bargaining agreement (“CBA”) by unilaterally implementing a rule requiring employees to use “TSheets” for clocking-in and clocking-out. See In re Brick and Allied Craft Union of Canada & Brick and Allied Craft Union of Canada, Local 31, Applicant v Terrazzo, Tile & Marble Guild of Ontario Inc., OLRB Case No: 2708-18-G (Oct. 17, 2019).

Contractors wishing to require employees to use an electronic timekeeping app should not be deterred by the Canadian arbitration decision. As outlined in detail below, ***a contractor can generally mandate that employees use an electronic app-based time-keeping system*** (including GPS tracking), provided that it is not ***specifically*** forbidden by the contractor’s CBA.

Nevertheless, the contractor must be prepared to show that the new requirement is “reasonable” and meet with the union to discuss any impact on bargaining unit members. Finally, because every CBA is different, it is important to carefully review your CBA as well as consult with labor counsel before implementing any changes to the terms and conditions of employees represented by a union.

Potential Union Challenges

If the Union wants to rebuff a contractor’s implementation of an app-based timekeeping system, the Union can raise two legal challenges. *First*, the Union can file a grievance and allege that the policy violates a specific provision of the CBA. *Second*, the Union can file an unfair labor practice charge (“ULP”) and allege that the contractor unilaterally implemented the change without notifying the Union in violation of Section 8(a)(5) and 8(d) of the National Labor Relations Act (“NLRA”).

As outlined in the next section, a contractor can avoid both claims by following the six-step implementation procedure outlined below.

Importantly, though, if a contractor has already implemented an app-based timekeeping system and the Union has not objected, then the contractor should stand pat and continue utilizing the system. The

Union may later try to object, but the contractor can claim that the Union was “on notice” of the change and failed to challenge the policy within the six-month limitations period under the NLRA and/or the period set forth in the parties’ CBA for filing a grievance.

Ideal Sequence of Events

Contractors wishing to implement an electronic timekeeping app should take the following six steps:

Step #1 – Finalize Your Plan for Implementing an App-Based Timekeeping System

To the greatest extent possible, finalize your plan for implementing an app-based timekeeping system before announcing your intention to employees or the Union. At a minimum, you should be able to answer the following questions:

- Which timekeeping app employees will be required to download and use?
- Whether employees will be required to download the app on their personal or company-provided cell phones?
- How will employees without a cell phone be able to clock-in and clock-out (e.g., kiosk or help from supervisor)?
- Will GPS data be used by the contractor for attendance/discipline?
- Will GPS data be collected or used during non-working time?
- What, if any, employee expenses will be reimbursed by the contractor?

You should anticipate concerns that may be raised by the Union (e.g., cost reimbursement, GPS tracking, privacy, etc.) and have a plan for how your policy will address those concerns.

Step #2 – Review the CBA to Ensure No Conflict

Before announcing your intention to the Union, be sure to carefully review your CBA to ensure that your planned implementation (described in Step #1) does not conflict with any provision in the CBA.

For example, a “management rights” clause may allow you to implement “reasonable” rules, but you should make sure that other provisions do not conflict with your proposed app-based timekeeping policy. Even in the absence of a “management rights” clause, it is generally recognized that management “has reserved its right to manage *unless* it has limited its right by some *specific* provision of the labor agreement.” Elkouri & Elkouri, *How Arbitration Works* § 13.1.B. (8th ed. 2020). Thus, even in the absence of a “management rights” clause, an employer cannot be said to have violated the CBA unless the union can point to a *specific* contract provision prohibiting the practice.

Most CBAs do not specifically forbid adopting an app-based timekeeping policy, but you should ensure that other provisions of the CBA cannot be used by the Union to argue that your adoption of the policy violates the CBA.

Step #3 – Announce Your Intention to the Union

Before you broadly announce the new policy to all employees, be sure to first send a separate communication to the Union stating your intention.

Consider the following sample communication:

Dear [Union Representative]:

To make it easier for employees to punch-in and punch-out, as well as to increase efficiency and accountability, we are planning to implement an app-based timekeeping system that will allow employees to clock-in and clock-out on their [company-provided or personal] cell phone.

It is anticipated that employees will be required to begin using the new system on [date], but the policy documents are still being developed. I will share more information on the policy as it becomes available.

If you have questions or would like to meet regarding the new timekeeping system, please feel free to contact me at [email and telephone].

Step #4 – Meet with the Union (if requested by the Union)

If the Union requests to meet regarding your planned implementation of a new app-based timekeeping system, then you should agree to meet. Remember, ***this does not mean that you need to make changes to your policy.*** Instead, you and your team should be prepared to answer the Union's questions and, if you do not desire to make policy changes proposed by the Union, explain your position.

Do not be surprised, however, if the Union has a good idea or two on how to make the policy better. If so, you could incorporate the change or, at the very least, take some time to review the Union's proposed change with leadership and ensure that the change could be made for all employees (rather than risking having separate policies or procedures).

If the Union challenges the policy through the grievance-arbitration procedure, it is important to be able to establish that the policy, and the procedures under the policy, are ***reasonable***, and that you were reasonable in your communications and meetings with the Union regarding the policy and its implementation.

If you incorporate any of the changes or suggestions requested by the Union, this will assist in our defense if the policy or the related procedures are challenged. And even if you are unwilling or unable to agree to certain requests made by the Union, if the evidence demonstrates that you considered the Union's points, and responded with rational explanations for your position, this will still be helpful.

Step #5 – Implement the Policy

After exhausting any discussions with the Union (again, remembering that you do ***not*** have to adopt any of the Union’s proposed changes), then you should plan for implementing the policy and requiring employees to utilize the new timekeeping app by a certain date. Be sure to give enough time between your announcement and implementation to give you time to meet with the Union (again, only if the Union requests a meeting).

Step #6 – Process Any Grievances and Defend Any ULPs

If the Union files a grievance, you should process any grievance through the normal grievance and arbitration process. If the Union files a ULP, then you should ask that it be deferred to the CBA’s grievance and arbitration process, because the Union is really challenging whether the change violated the parties’ CBA.