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NLRB General Counsel Issues Memo on Electronic Monitoring, Artificial Intelligence and Employee's Section 7 Rights

With the proliferation of remote work options in today's post-pandemic world, employers' electronic monitoring of their employees' daily activities has become more routine. On October 31, the National Labor Relations Board (Board) general counsel (GC) released a new memo cautioning against the potential violations of Section 7 of the National Labor Relations Act (Act) that use of such electronic monitoring may raise by "significantly impairing or negating employees' ability to engage in protected activity and keep that activity confidential from their employer[.]" The GC announced intent to urge the Board to "zealously enforc[e]" existing Board precedent in this context and protect employees rights "to the greatest extent possible."

Cautioning that an employer's right to utilize such technology is "not unlimited,"[1] the memo puts forth a new framework for Board analysis of these issues, which the GC states is consistent with the Board's analysis of facially neutral work rules cases. The GC plans to "urge the Board" to find a ***presumptive 8(a)(1) violation***, "where the employer's surveillance and management practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act." Then, "if the employer establishes that the practices at issue are narrowly tailored to address a legitimate business need—i.e., that its need cannot be met through means less damaging to employee rights," the Board is urged to then balance employer and employee rights. Finally, if after balancing these interests, the Board weighs in the employer's favor, then absent the employer successfully establishing "special circumstances" which would necessitate covert technology use, the Board will be urged "to require the employer to disclose to employees the technologies it uses," including the employer's reasons and how it is utilizing the information.

The GC notes several specific ways an employer can violate the Act using electronic monitoring and related tools. For example, the memo states that "an employer violates Section 8(1)(a) if it institutes new monitoring technologies in response to activity protected by Section 7; utilizes technologies already in place for the purpose of discovering that activity, including by reviewing security-camera footage or employees' social-media accounts; *or creates the impression that it is doing such things*." (emphasis added). Along the same lines, the memo further explains that "certain conduct can be unlawful *even if it merely creates an impression of surveillance*," and that whether employer surveillance of Section 7 activity is overt or covert is irrelevant. (emphasis added). Employers may also violate Section 8(a)(1) if they "discipline employees who concertedly protest workplace surveillance or the pace of work set by algorithmic management"; "coercively question employees with personality tests designed to evaluate their propensity to seek union representation"; or "dismantle or preclude employee conversations or isolate union supporters or discontented employees to prevent Section 7 activity."

1 Internal citations are omitted from this post.

Additionally, according to the memo, employers (and third-party software providers) may also be in violation of Section 8(a)(3) if they "rely on artificial intelligence to screen job applicants or issue discipline"—"if the underlying algorithm is making decisions based on employees' protected activity"; or "by discriminatorily applying production quotas or efficiency standards to rid themselves of union supporters." Further, Section 8(a)(5) may be violated, if "where employees have union representation," "if they fail to provide information about, and bargain over, the implementation of tracking technologies and their use of the data they accumulate."

The memo also suggests new language for settlement proposals in "cases that do not proceed to a Board decision," suggesting Regions include this specific language in "appropriate cases": "*The Charged Party will report to the U.S. Department of Labor, Office of Labor-Management Standards, via its Form LM-10, the amount of any payments or expenditures made in conjunction with the conduct at issue in this case"* – meaning, the employer's cost for use of the monitoring technology in question.

Finally, in continuing a recent trend, the GC announced intent to take an interagency approach to this, along with the Federal Trade Commission, the Consumer Financial Protection Bureau, Department of Justice, Equal Employment Opportunity Commission, and the Department of Labor.

Although it is not yet clear whether or how soon the Board will take up these recommendations, and whether some aspects may be challenged as overreach, in light of this new memo, employers should evaluate their use of electronic monitoring and artificial intelligence (AI) practices and whether any such practice could potentially violate the Act. Additionally, New York employers should also remain cognizant of the electronic monitoring law that went into effect earlier this year, discussed here, and New York City employers should bear in mind the new New York City AI law going into effect in January 2023, discussed here.

For more information, please feel free to reach out to Lisa Feldman or any Bond attorney with whom you are regularly in contact.

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