NLRB General Counsel Seeks Limits On Employer Electronic Surveillance and Automated Management Practices

On October 31, 2022, National Labor Relations Board (NLRB) General Counsel Jennifer Abruzzo issued a memorandum advocating for adoption of a new framework for policing employer use of electronic monitoring and automated management practices. The memorandum serves as a reminder to all employers operating in the post-COVID-19 remote workspace that their employee monitoring practices may be subject to increased scrutiny by the NLRB.

Increased Use of Electronic Surveillance

In the memorandum, the General Counsel asserts that “omnipresent surveillance and other algorithmic-management tools” increasingly interfere with the rights of employees under the National Labor Relations Act (NLRA or the Act) to confidentially engage in protected activity, such as advocating for changes to their terms and conditions of employment or advocating for union representation.

As examples, the General Counsel describes a variety of technologies and practices, including: (1) wearable devices which track the movements and conversations of warehouse employees; (2) cameras and GPS trackers monitoring drivers; and (3) keyloggers, webcams, and audio recording devices which monitor employees in the office or at home. The General Counsel notes that employers also monitor employees during non-working time using employer-issued phones or apps, or by analyzing employee social media accounts.

The General Counsel compares these new technologies to older surveillance techniques restricted by the NLRB.

Such practices, which either surveil employees or give the impression of surveillance, may violate the Act. For instance, employers generally cannot take photographs of employees engaged in protected activities, such as picketing, as doing so may result in intimidation and chill the exercise of employee rights under the Act. The memorandum implies that monitoring employees in the workplace – even for facially neutral reasons unassociated with unionization - may be similarly unlawful.
The Proposed Framework

The General Counsel’s proposed framework presumes that employers violate the rights of their employees if their 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.” The employer bears the burden of establishing that their practices are narrowly tailored to address a legitimate business need, which cannot be satisfied through means less damaging to employee rights. The employer’s needs would then be balanced against the interests of the employees’ rights under the Act. Finally, even where the employer’s needs outweigh those of the employee, the employer would generally have to disclose to employees the surveillance technologies or practices, the reasons for monitoring, and how the employer uses the information after it is obtained.

The General Counsel concludes by noting her commitment to cooperating with other federal agencies – including the Federal Trade Commission, the Consumer Financial Protection Bureau, Department of Justice, Equal Employment Opportunity Commission, and the Department of Labor - to curtail the use of employer surveillance and algorithmic management technologies.

Takeaways

Ultimately, the General Counsel’s memorandum creates more questions than it answers, including:

- Will the NLRB adopt the General Counsel’s proposed framework?
- What technologies and practices will be targeted by the General Counsel?
- When does the use of these technologies and practices interfere with employee protected activity?
- How can employers narrowly tailor their practices to address legitimate business needs, while still protecting employee rights under the Act?

What is clear is that the General Counsel will consider taking action against employers – both union and non-union - engaged in employee electronic monitoring. This is consistent with the General Counsel’s aggressive stance on overturning precedent in other areas of labor law (such as enforcement of handbook rules), and in pursuing forceful remedies against employers.

In light of this memorandum, employers may wish to audit their current practices to ensure compliance with federal and state laws regarding privacy and surveillance, and demonstrate the legitimate business needs for such practices.

© 2024 ArentFox Schiff LLP

National Law Review, Volumess XII, Number 319