# NLRB General Counsel Announces Plans to Crack Down on Workplace Monitoring Practices

Insights
11.07.22

The top lawyer from the National Labor Relations Board recently announced that agency investigators should target workplace surveillance and "algorithmic management" technologies that have a "tendency" to interfere with employees' protected workplace activity – an announcement that will soon impact both unionized and non-unionized workplaces alike. General Counsel Jennifer Abruzzo's GC Memo 23-02, issued on October 31, represents the latest in a series of memoranda restricting employer workplace rights. It asserts that increased reliance on sophisticated technological tools to monitor employee activities on the heels of the pandemic have the practical effect of chilling union and other protected concerted activities, and that AI-driven software could use data obtained from such surveillance to make automated decisions that discourage those activities. What do employers need to know about this potentially wide-sweeping new approach?

**NLRB GC's Plan, In a Nutshell**

The General Counsel's plan to curtail workplace use of such technologies and practices is twofold.

- First, the memo calls upon all regional personnel under her command to "vigorously" enforce existing Board doctrine restricting surveillance practices in the context of active organizing activity.
- Second, the memo mandates the submission of all "intrusive or abusive" electronic surveillance and algorithmic management initiatives (regardless of whether they are implemented against the backdrop of union activity) to the agency's Division of Advice in an effort to secure a "new framework for protecting employees from intrusive or abusive" employer practices.

General Counsel Abruzzo has been particularly active when it comes to the issuance of GC Memos, releasing them on a monthly basis since she was sworn in last year. While they don't represent the official legal position of the entire agency, they do represent the policy and guidance for all regional offices investigating and prosecuting charges against employers. They are also used to advance proposed changes to existing legal doctrine through an administrative framework that runs from the agency's Division of Administrative Law Judges up to the five members of the NLRB itself. Consequently, you can now expect to be on the receiving end of unfair labor practice charges and objections to representation elections alleging violation of these new standards in an effort to bring about supporting decisions from the NLRB itself.

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

Consequently, while GC Memo 23-02 does not yet carry the force of law, it does serve as an important bellwether for the NLRB's current enforcement posture at a regional level. When combined with the policy developments that may be coming as the NLRB continues to exercise its broad-based decision-making authority, this and other similar Memos serve as critical touchpoints that employers need to consider as you prepare for what's coming.

**What Can Employers Expect When It Comes to "Vigorous Enforcement" of Existing Precedent?**

Existing NLRB doctrine already imposes restrictions on workplace surveillance for purposes of safeguarding employee rights under the NLRA. For non-union employers, however, those restrictions generally do not extend to neutral practices that do not directly interfere with NLRA-protected activity.

At its essence, existing law is currently designed to prohibit employers from implementing new surveillance practices in an effort to monitor or record ongoing union activity. Consequently, you are prohibited from recording employees engaged in picketing or other protected activities for purposes of coercing employees in the exercise of such activities. Nor can you initiate surveillance in response to suspected organizing activity, or for the purpose of spying on such activity. By the same token, it is also unlawful for you to discipline employees who complain about such policies or practices.

In response to the General Counsel's directive, however, you can now expect the agency's field investigators to step up enforcement efforts when it comes to implementation of monitoring systems within the context of ongoing organizing activity. If you have a vested interest in implementing such practices, you should consider articulating the business reasons for doing so (for example, by reference to safety, operational or efficiency considerations) prior to implementation. And you should also prepare to demonstrate the basis for implementation when challenged against the backdrop of organizing or other protected activity.

**What Can You Expect if The NLRB Adopts the GC's Proposed Framework for Evaluating Workplace Monitoring?**

The General Counsel's proposed framework would impose unprecedented burdens on employers to justify and affirmatively defend all forms of workplace surveillance and automated management practices – regardless of whether a labor union is on the scene (or even being contemplated). This framework would establish four separate hurdles for employers to clear, as outlined below:

1. **Presumptive Violation**. The proposed framework begins by *presuming* that the National Labor Relations Act (NLRA) has been violated whenever an employer implements or maintains any surveillance or "management practice" (written or unwritten) that, when viewed as a whole, tends to "prevent a reasonable employee from engaging in protected activity" – even where the scope of the practice is confined to an employee's working time. The General Counsel casts a wide net of examples falling into this category. It includes tracking devices, security cameras, RFID badges, and "dash cam" systems. It also includes a host of computer-monitoring devices

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

RFID badges, and "dash cam" systems. It also includes a host of computer-monitoring devices on both company and private computers such as keyloggers, webcam photos, audio recordings, personal device apps, and even social media monitoring (of both applicants and current employees). As the memo itself acknowledges, this presumption would effectively extend to any form of electronic monitoring: covert or not, on or off duty, and on or off employer property.

2. **The Employer's Burden**. Once this broad-based presumption attaches, the burden would fall upon the employer to affirmatively establish that its practice is "narrowly tailored to address a legitimate business need." This prong is particularly onerous to the extent it requires not only a legitimate business justification, but also proof that that the stated objective could not be accomplished by other less restrictive means.
3. **The Board's Balancing Test**. Only after the employer has met this burden would the Board endeavor to balance the employer's interests against those of the employee to determine if the practice is permissible. This means that even if the employer can justify its practice as narrowly tailored with no alternative means, the Board would still find a violation if it determines that employee rights outweigh the employer's legitimate business interests. Within a challenging regulatory climate, this balancing test could prove problematic for even the most well-intended employers.
4. **Mandatory Disclosure of Covert Practices**. As proposed, it seems that the General Counsel has crafted a test that is virtually impossible for employers to pass. Even if the practices at issue manage to withstand this balancing test, however, the employer would still be required to disclose any covert monitoring practices (and the reasons behind them) to the entire workforce in the absence of "special circumstances." Such affirmative disclosure requirements – in the absence of ongoing organizing activity and despite a balancing of interests in favor of the employer – would be virtually unprecedented in the annals of workplace law.

**Prepare for An Incredibly Broad Standard**

It's important to keep in mind that while existing legal precedent focuses on practices that specifically target protected activity, the proposed framework would challenge facially neutral monitoring and surveillance practices (which the memo broadly characterizes as "abusive or intrusive") based solely on the assumption that they "*could* inhibit" protected activities, regardless of employer intent. This comes at a time when technological innovations make a broad spectrum of tools and data available to employers for purposes of safeguarding workplace safety and securing trade secrets and other protectable interests.

By applying an automatic presumption that such initiatives have a tendency to interfere with protected activity, the General Counsel appears to be resurrecting the agency's Obama-era *Lutheran Heritage* standard – which had been utilized to evaluate facially neutral written policies up until it was reversed and replaced by the current *Boeing* test in 2017. While there is reason to believe that the agency will soon return to that standard when it soon issues its long-anticipated decision in *Stericycle, Inc.*, it's important to remember that not all facially neutral employer monitoring and

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

surveillance policies (be they overt or covert) are reduced to writing. Moreover, the evolving nature of the underlying technology may not lend such practices to the printed page.

It remains to be seen how the agency will apply these principles should it ultimately adopt aspects of the General Counsel's proposed framework. At the very least, however, the new GC Memo suggests that you should take the opportunity to review existing surveillance and monitoring initiatives to ensure that they are sufficiently tailored to conform to your underlying business objectives.

It's also worth noting that at the conclusion of the Memo, the General Counsel underscores her intent to apply an "interagency" approach that leverages the Board's recent forays into coordination with a broad spectrum of other federal agencies, including the FTC, DOJ, CFPB, EEOC, and DOL, consistent with her prior memos confirming those coordination plans. We cannot yet determine how those efforts will apply to information garnered from regional investigations into employer monitoring practices, but uncertainties surrounding that initiative represent yet another potentially troubling development for the business community.

**What Does all this Mean for Employers?**

As the availability of new innovations increases by the day, employers may soon find themselves confronting a Hobson's choice between embracing the cutting-edge technology of the modern-day workplace and managing the risk of non-compliance with a new framework for evaluating employee workplace rights. Union or no union, the General Counsel has laid a series of traps for unwary employers who may soon find themselves on the receiving end of unfair labor practice charges.

Should you respond to these latest initiatives by abandoning valuable safety, security, efficiency and (in some cases) compliance benefits that are potentially critical to business success in an increasingly competitive marketplace? While the current regulatory environment certainly imposes new (and in some cases unprecedented) elements of risk, such risks can be managed by adhering to a few core principles when it comes to administration of employee monitoring practices.

For example, you should take steps to articulate and document the legitimate reasons for such initiatives prior to implementing them or as you continue to administer them. Where feasible, you should consider confining the scope of such provisions to employee working time, and explore other prospects for narrowly tailoring application around their unique business objectives. You should also train supervisors to administer such practices in compliance with existing NLRB doctrine. Lastly, unionized and non-union employers alike should tread cautiously when implementing new monitoring technologies and programs in close consultation with legal counsel.

**Conclusion**

We will continue to monitor these developments and provide updates as necessary. Make sure you are subscribed to Fisher Phillips' Insight system to receive the most up-to-date information. If you

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

have questions on how these developments may impact your organization and workforce, please contact your Fisher Phillips attorney, the authors of this Insight, or any member of our Labor Relations Practice Group.

## *Related People*

**Steven M. Bernstein**
Regional Managing Partner and Labor Relations Group Co-Chair
813.769.7513
Email

**Eleanor F. Miller**
Associate
202.916.7189
Email

## *Service Focus*

AI, Data, and Analytics

Counseling and Advice

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.