

Insights, News & Events

WHAT NLRB'S NEW COLLABORATION WITH CONSUMER FINANCIAL AGENCY MEANS FOR GIG ECONOMY BUSINESSES

Insights
Mar 9, 2023

If your business relies on gig economy workers, you may want to review your policies on monitoring workers and requiring them to pay for training and equipment. That's because the National Labor Relations Board (NLRB) announced on Tuesday that it's joining forces with the Consumer Financial Protection Bureau (CFPB) to address potential misconduct regarding workplace surveillance, monitoring, data collection, and employer-driven debt. The agencies said they will share information to enhance their enforcement efforts and better protect workers in the gig economy and other labor markets from harmful financial practices. What do you need to know about the new Memorandum of Understanding and its impact on the workplace?

Worker-Funded Training and Equipment Scrutinized

The NLRB and CFPB are sharing information in an effort to ensure workers are "more fully protected from bad actors, debt traps, and illegal labor practices," according to [a March 7 announcement](#).

Among other workplace practices, the agencies will be cracking down on employer requirements for workers to pay for training and equipment "that they might not need, or that may be more expensive or harmful than what they might purchase in a competitive market." The rationale is that such practices may cause workers to go into debt to their employer or third parties. CFPB Director Rohit Chopra said these so-called "debt traps" prevent workers from leaving

Related People



Steven M. Bernstein

Regional Managing Partner
and Labor Relations Group
Co-Chair

813.769.7513



Todd A. Lyon

Partner and Labor Relations
Group Co-Chair

one job for another and seeking better wages and working conditions.

But the agencies didn't clarify what would make such investments unnecessary, harmful, or too expensive. It is commonplace for gig workers and other independent contractors to supply their own equipment, as they are generally viewed as independent business owners and not employees of the company.

Unfortunately, however, the test to determine proper worker classification is growing increasingly murky as states and the federal government adopt different definitions and standards — and this level of scrutiny over business expenses and training may only add to the confusion.

Electronic Monitoring and Data Collection Also Targeted

When announcing the agreement with the CFPB, NLRB General Counsel Jennifer Abruzzo noted that many employers use electronic monitoring systems and other artificial intelligence tools to measure productivity. She raised concerns that such tools may be used to track workers when they are off duty and said companies that own the surveillance systems might sell worker data to financial institutions, insurers, and other employers. She warned that such practices may violate the Fair Credit Reporting Act (FCRA) and other consumer financial protection laws. She also claimed that employer use of artificial intelligence tools might "chill workers from exercising their labor rights."

These statements re-emphasize that the Biden administration is focused on AI's impact on workplace compliance and highlight the importance of complying with FCRA, as well as federal, state, and local laws regulating privacy rights, data collection, and electronic monitoring.

You can read more, [here](#), on how gig economy companies can protect all the sensitive data they accumulate from customers and workers.

Expect More Collaboration

This new information-sharing arrangement with the CFPB highlights the NLRB's ongoing desire to maintain "relevance" in a changing economy – regardless of the involvement (or lack thereof) of labor unions.

503.205.8095

Service Focus

AI, Data, and Analytics

Labor Relations

Resource Hubs

AI Governance Hub

Notably, the NLRB's Memorandum of Understanding with the CFPB is not the agencies' first information sharing arrangement under the Biden administration. In fact, last year GC Abruzzo stated her commit to teaming up with other federal agencies to help reach the agency's goals. For instance, the NLRB is also collaborating with the Federal Trade Commission and the DOL's Wage and Hour Division to enhance their information sharing, investigations, enforcement, training, and outreach.

The NLRB explained that [the agreement with the DOL](#) will allow for "better enforcement against unlawful pay practices, misclassification of workers as independent contractors, and retaliation against workers who exercise their rights."

Regarding the Board's [collaboration with the FTC](#), the agencies identified the following mutual areas of interest: the misclassification of workers in the gig economy, imposition of restrictive noncompete and nondisclosure provisions, and the "ability of workers to act collectively."

What Should Gig Economy Businesses Do?

Notably, the current NLRB has been trying to expand the number of workers who are considered employees rather than independent contractors under the National Labor Relations Act (NLRA). The distinction is important because gig economy workers and other independent contractors — who generally have more flexibility and autonomy over their schedules and work assignments — aren't covered by the NLRA and many other labor and employment laws.

Despite the distinction, officials in the Biden administration have made clear that they think gig economy workers should be allowed to unionize. On the flipside, many business groups have argued that current employee-independent contractor models do not fit the 21st-century workforce. Some employer groups have called on Congress to pass a bill that would create [a hybrid job classification](#), particularly for gig workers, but those efforts have yet to gain traction.

In the meantime, you've likely noticed common themes arise: The NLRB is collaborating with other agencies to focus on misclassification of workers, worker mobility in the job market, and workers' ability to act collectively. Thus, businesses that are part of the gig economy or have

independent contractors should consider taking the following actions:

- **Worker Classification:** Perform internal audits to assess your level of risk for misclassification.
- **Training and Equipment:** Review any policies that require workers to pay for their own training and equipment to ensure these rules are not unnecessary or too expensive or harmful when compared to a competitive market.
- **Data Privacy:** Work with experienced counsel to ensure compliance with FCRA, as well as federal, state, and local laws regulating privacy rights, data collection, and electronic monitoring.
- **Labor Relations:** Ensure your leaders are up to date on the scope of the National Labor Relations Act and the latest rulings and guidance from the NLRB.

Conclusion

We will continue to monitor workplace law developments as they apply to gig economy businesses, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information directly to your inbox. If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our [Gig Economy Team](#) or in our [Labor Relations Practice Group](#) to assess and minimize potential risks.