

Forensic Review During Investigations: Have You Considered The NLRA?

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NLRB General Counsel Jennifer Abruzzo is pressing for stricter enforcement against the use of workplace technologies to monitor employees. As a result, employers should consider the National Labor Relations Act (the “Act”) when conducting forensic reviews of employee emails and texts during internal investigations.

On October 31, 2022, Abruzzo issued Memorandum GC 23-02 titled Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights. This memo urges the NLRB to find that employers presumptively violate the Act if their electronic monitoring and automated management practices interfere with or prevent covered employees from engaging in protected concerted activity.

Abruzzo suggests a new legal framework for determining the lawfulness of electronically monitoring employees. Her memo proposes that if the employer establishes that their surveillance practices 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 should balance the respective interests of the employer and the employees to determine whether the Act permits the employer’s practices. Even if the employer’s business need outweighs the employee’s rights, Abruzzo suggests that an employer should be required to disclose to employees the technologies it uses to monitor and manage them, its reasons for doing so, and how it is using the information it obtains.

When conducting internal investigations, employers should be cognizant of the NLRB General Counsel’s new focus relating to electronic monitoring. A forensic review of employee emails and texts should be carefully tailored to the situation to make it more likely to be acceptable under any new standard the NLRB may set based on Abruzzo’s initiative. Employers should consider whether their existing policies are appropriately tailored and sufficiently address the review of e-mails/texts during an internal investigation.

Employers should be aware of other examples Abruzzo identifies relating to how the increased use of new technologies for monitoring employees might violate the Act, including: (1) using wearable devices, security cameras, and radio frequency identification badges to track conversations and

movements; (2) inserting GPS tracking devices and cameras in vehicles used by employee drivers; and (3) utilizing computers to monitor employees in call centers, offices, or at home through keyloggers and software that takes screenshots, webcam photos, or audio recordings throughout the day.

Her memo also considers when surveillance extends to break times and nonwork areas – which could be viewed as preventing employees from engaging in solicitation or distribution of union literature during nonworking time. Just recently, in *Stern Produce Co.* 372 NLRB No. 74 (Apr. 11, 2023), the Board considered a situation where a known union-supporting employee was told by his supervisor not to cover the inside-facing camera in his truck during a lunch break. The Board found that the employer violated the Act because the supervisor's actions created an impression of surveillance which departed from the Employer's past practice as the employee was never told not to cover the camera during his lunch break and was not aware of a policy prohibiting employees from doing so.

In sum, employers should keep their eye on the possible NLRB impact on internal investigations. Considering Abruzzo's memo, employers should evaluate their electronic monitoring policies, and review NLRB updates on enforcement against such practices as well as their internal investigation strategies for legal compliance on an ongoing basis.

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