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A Workplace Law Update

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NLRB General Counsel Puts Employers on Notice That Employee Electronic Monitoring May Violate the NLRA

By: Rebecca Seguin-Skrabucha, Senior Associate, Workplace Law Group

As technological advancements make electronic monitoring of employees easier, the proliferation of remote work creates new and strong incentives for employer investment in such monitoring tools. This dynamic prompted National Labor Relations Board ("NLRB" or "Board") General Counsel Jennifer Abruzzo to publish Memorandum GC 23-02, cautioning employers that "electronic monitoring and algorithmic management of employees" may interfere with employees' exercise of their Section 7 rights, and proposing a test to evaluate alleged interference.

Section 7 of the National Labor Relations Act ("NLRA") guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" and the right "to refrain from any or all such activities." In Memorandum GC 23-02, Abruzzo cites longer-standing limitations on employer monitoring activities (e.g., restriction on "pictorial recordkeeping" of "picketing or handbilling") to assert that electronic monitoring of employees may similarly and unlawfully stifle protected concerted activity: "Close, constant surveillance and management through electronic means threaten employees' basic ability to exercise their rights."

Abruzzo recommends that the Board balance employers' legitimate business reasons for and interest in electronic monitoring against employees' Section 7 rights. The considered "balance" begins with the presumption that an employer violates the NLRA "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" NLRA. Even if an employer's legitimate business needs demonstrate "that special circumstances require covert use" of electronic monitoring, Abruzzo suggests that the employer should still be required "to disclose to employees the technologies it uses . . . its reasons for doing so . . . and how it is using the information it obtains."

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This proposed framework has not yet been adopted, but the NLRB is ready for a test case. And, if this framework were adopted, employers would face a significantly heightened burden of proof to justify their utilization of electronic monitoring technologies.

In the meantime, employers should consider whether any current employee monitoring is sufficiently supported by legitimate business needs and narrowly tailored to accomplish those needs. Employers should also ensure compliance with state and local laws that regulate employee monitoring.

Bodman's Workplace Law Group continues to monitor for developments from the General Counsel and the NLRB. Employers should contact any member of Bodman's Workplace Law Group for help creating compliant policies that address electronic monitoring of employee activity.

Bodman may not be able to respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

WORKPLACE LAW PRACTICE GROUP			
	AARON D. GRAVES | *Chair* 313.392.1075 agraves@bodmanlaw.com	**JOHN T. BELOW** 248-743-6035 jbelow@bodmanlaw.com	**ALEXANDER J. BURRIDGE** 313.393.7560 aburridge@bodmanlaw.com
	JOHN C. CASHEN | *Of Counsel* 248.743.6077 jcashen@bodmanlaw.com	**AMANADA MCSWEEN EMPEY** 313-392-1056 aempey@bodmanlaw.com	**GARY S. FEALK** 248-743-6060 gfealk@bodmanlaw.com
	JOHN DAVID GARDINER 616.205.3123 jgardiner@bodmanlaw.com	**MICHELLE L. KOLKMEYER** 248.743.6031 mkolkmeyer@bodmanlaw.com	**KAREN L. PIPER** | *Of Counsel* 248.743.6025 kpiper@bodmanlaw.com
	REBECCA C. SEGUIN-SKRABUCHA 248.925.1936 rseguin-skrabucha@bodmanlaw.com	**MELISSA M. TETREAU** 248.743.6078 mtetreau@bodmanlaw.com	**DAVID B. WALTERS** 248.743.6052 dwalters@bodmanlaw.com