NOVEMBER 3, 2022 | TRADITIONAL LABOR RELATIONS

NLRB Memo Addresses Electronic Monitoring and Algorithmic Tools' Effects on Employee Section 7 Rights

By: Kara Maciel and Darius Rohani-Shukla

On October 31, 2022, the National Labor Relations Board (the "Board") General Counsel Jennifer Abruzzo sent a memo to all regional directors, officers-in-charge, and resident officers communicating her concerns over electronic monitoring and algorithmic management. The memo highlighted concerns that employers might be able to use those tools to impair or negate employees' ability to exercise their rights under Section 7 of the National Labor Relations Act (the "Act").

Technological advancements have enabled employers to surveil and analyze employees in increasingly intrusive ways. For example, employers can record workers' conversations, track their movements with wearable devices, and monitor employees' computers with keyloggers and software. Employers can also use algorithms to: identify disengaged employees at risk of leaving their employment; suggest career paths for current employees; assist employers through the performance management process; assess personality, aptitude, skills, and perceived "cultural fit;" and even monitor employee efficiency.

The Board has previously recognized that some employer surveilling practices are unlawful. In instances where employees are engaging in protected concerted activity and public union activity – the Board has acknowledged that photographing employees engaging in protected concerted activities is intimidating. An employer's capacity to surveil its employees is analyzed by balancing its justification for the surveillance versus the apparent risk of interfering with or deterring employee activity.

Surveillance Technologies and Algorithmic Tools impact employees' rights under Section 7 and Section 8(a)(1) of the Act:

- **Section 7** of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities."
- **Section 8(a)(1)** of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act.

Employer can violate Section 8(a)(1) through the following activities:

- Instituting new monitoring technologies in response to activity protected by Section 7;
- Utilizing technologies already in place to discover that activity, including by reviewing security-camera footage or employees' social-media accounts;
- Creating the impression that it is doing such things; or
- Disciplining employees who concertedly protest workplace surveillance or the pace of work set by algorithmic management.

Electronic Surveillance in the Workplace

Employers could use excessive surveillance in the workplace to deter employees who seek to engage in protected conversations about unionization or terms and conditions of employment before group action. If the surveillance includes break times and nonwork areas, employees may feel unable to engage in solicitation or distribution of union literature during nonworking time.

The Board will presume that an employer has violated Section 8(a)(1), 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 Act.

- If the employer can demonstrate that its surveillance practices or algorithmic tools are sufficiently narrowly tailored for a legitimate business need, General Counsel Abruzzo indicated that she would urge the Board to balance the respective interests of the employer and the employees to determine whether the Act permits the employer's practices.
- In situations where the Board discerns that an employer's business need outweighs employees' Section 7 rights, General Counsel Abruzzo indicated that she would still urge the Board to require the employer 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. Only with that information can employees intelligently exercise their Section 7 rights and take suitable measures to protect the confidentiality of their protected activity.

Additionally, an employer who, for any reason, needs to spend money on surveillance technology "to obtain information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer" must generally file a Form LM-10 to report the expenditure.

Use of Algorithmic Tools in Making Employment Decisions

- **Section 8(a)(3)** of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment[,] to encourage or discourage membership in any labor organization.

Employers using artificial intelligence to screen job applicants or issue discipline may violate Section 8(a)(3) if the **underlying algorithm makes decisions based on employees' protected activity**. For example, an employer who uses a third-party software provider to scan resumes to detect text that matches an employer's desired qualities or evaluates a candidate's performance on personality tests to analyze employees' protected activity could violate Section 8(a)(3) if they are not careful.

In sum, employers implementing surveillance technologies or algorithmic tools should consider their potential to affect employees in workplaces where they engage in protected activity under Section 7 of the Act. Without comprehensively analyzing those issues, employers risk potential violations under the Act.