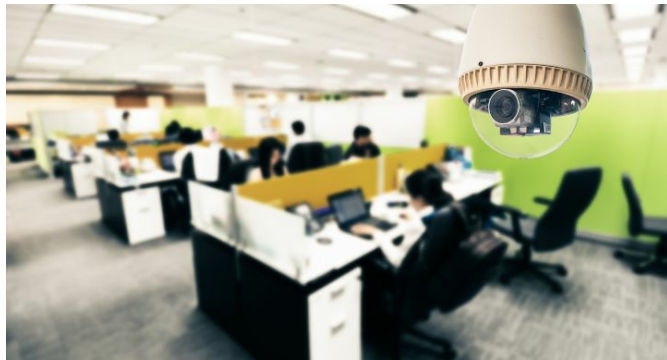


“I Always Feel Like, Somebody’s Watching Me”: How the NLRB General Counsel Proposes to Curtail Employer Surveillance

Written By **S. McKinley Gray, III** (smg@wardandsmith.com) and **Avery J. Locklear** (ajlocklear@wardandsmith.com)

December 16, 2022



On October 31, 2022, National Labor Relations Board ('NLRB') General Counsel, Jennifer A. Abruzzo, published a memorandum outlining a new framework she intends to use to advocate for restricting overreaching employer surveillance of employees.

A link to Abruzzo's memorandum can be found [here](#). All North Carolina employers should take note, as the NLRB and its National Labor Relations Act (the "Act") regulate private employers of two or more employees, and its employee protections apply to both union and non-union workers.

Section 7 of the Act guarantees employees protection for engaging in concerted activity, such as organizing, bargaining, forming, joining, or assisting labor organizations, for their mutual aid or protection. Section 8 of the Act makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce" employees in their exercise of Section 7 rights.

Technology has forever altered the landscape of the workplace and how employers monitor their employees. In her October 31st memorandum, Abruzzo outlines her concerns about employers excessively monitoring their employees through various means, including GPS tracking devices and apps installed on employees' personal devices. Specifically, Abruzzo's concern is that the omnipresent employer is no longer confined to the normal workday but instead attempts to encroach on an employee's personal life, which may prevent the exercise of Section 7 rights everywhere.

Surveillance and Section 7 Rights

NLRB principles have established that an employee's right to self-organize and bargain collectively includes the ability to communicate with their co-workers, both at the workplace and outside of working hours. In today's world, non-working hours are being limited or eliminated due to demanding jobs, which in turn severely restricts an employee's ability to engage in Section 7 communications. The NLRB believes that an employer's pervasive monitoring, or even an employee's reasonable fear that their employer's technological monitoring is far-reaching, may prevent the employee from exercising their Section 7 rights, resulting in an unfair labor practice.

While the NLRB recognizes that many employers have legitimate managerial interests in monitoring their employees, such interests are not limitless. For these reasons, Abruzzo has outlined her intent to protect employees "to the greatest extent possible" from abusive and intrusive electronic monitoring.

The New Zealous Framework

Beyond well-settled NLRB principles of Section 8 violations, including using technology to monitor, screen overtly, and intimidate employees who engage in protected activity, Abruzzo's memorandum outlines a new framework Abruzzo urges the NLRB to adopt.

The framework asks the NLRB to **presume** an employer has violated Section 8 when, viewed as a whole, the employer's surveillance and management practices tend to interfere or prevent an employee from engaging in concerted activity. After this presumption has been established, it is then the employer's obligation to demonstrate to the NLRB that (1) the employer has a legitimate business need for the monitoring, and (2) that the monitoring practices at issue are narrowly tailored to achieve that legitimate business need, meaning there is no other way to achieve it. Legitimate business needs include managing employee productivity, protecting confidential business information, and limiting employee misconduct.

If the employer is able to establish its legitimate business need and its monitoring practices are narrowly tailored, then the NLRB will balance the interests of the employer and employee. If the employer's business needs outweigh the employee's protected rights and the employer can demonstrate that special circumstances require its use of the technology, the employer should be fine under Abruzzo's proposals. If the employer is unable to establish a special circumstance, then Abruzzo would require the employer to disclose to its employees the technology used to monitor them and how the employer uses the information it obtains from the monitoring.

Conclusion

The modern workplace no longer looks like it did twenty or even two years ago. Employers are now relying on a decentralized workplace and workforce along with company and private devices to conduct business effectively. This shift gives employers valid reasons for monitoring employee activity. However, while technology plays a critical role in risk mitigation, as explained above, it can also increase legal risk.

If Abruzzo's new framework is adopted (which is yet to be determined), the NLRB is likely to find that more employers are violating employee Section 7 rights and committing unfair labor practices. Employers should begin to consider how extensive their technological surveying and monitoring practices are and if other, less intrusive means of achieving company goals are available. For further guidance to avoid unfair labor practices through technological monitoring, companies should consult counsel. Ward and Smith's Labor and Employment Team stands ready to help and will continue to monitor the Abruzzo's proposed framework and provide further guidance on whether and to what extent the NLRB adopts the framework.

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