Lathrop GPM

BLOGS

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Legal Issues with Employee Surveillance

Earlier this week we blogged about employee surveillance and its potential to change employee behavior. As noted there, employee surveillance is a powerful tool that raises significant legal issues, including those discussed below.

Discrimination Laws. State and federal discrimination laws prohibit employers from obtaining information related to the protected class status of applicants or employees, such as information about national origin, religion or genetic or family medical history. Employers must take care not to search for such protected information, whether through surveillance or otherwise, and must sequester it within a small need-to-know circle when it is unintentionally obtained.

Protected Activity Laws. A variety of laws protect certain employee activities, and legal risks are created for employers when surveillance encompasses legally-protected activity. The National Labor Relations Act (NLRA) is often applied to employer monitoring and surveillance activity, with varying results depending on the particular circumstances. Surveillance, or even the *impression of surveillance*, if instituted in response to a union organizing campaign, is likely to violate the NLRA. On the other hand, enhanced surveillance of employees that coincides with organizing activity may be found not to violate the law when it is justified by legitimate concerns for security, product integrity, or quality control. In a unionized workplace, video surveillance implemented without first bargaining with the union may violate the NLRA, but ongoing video surveillance for security reasons is otherwise generally permitted.

A patchwork of other state and federal laws protecting certain employee activity may also be implicated in employer surveillance initiatives. These include state prohibitions against taking employment action based on employees use of lawful consumable products such as tobacco. They also include federal and state whistleblower laws, as well as a wide range of statutes containing anti-retaliation provisions. Anytime surveillance looks for or finds such activity, it is important for the employer to have a policy and practice in place designed to reduce the possibility of liability arising from such information.

Privacy. Laws governing general rights of privacy for employees vary from state to state. Many states also have laws about audio (and in some cases, video) recording of employee activity. Employers operating in multiple states

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must be especially mindful of the variations in these laws to avoid legal claims of invasion of privacy or unlawful monitoring.

Email. Monitoring employee work emails and online activity involves some risk of legal claims, but it is an appropriate and lawful action if an employer is using best practices, as discussed in our posts here and here. Generally, one of the best ways for an employer to reduce its risk of liability in this context is by providing employees with clear advance notice of its surveillance policies and by creating policies that set appropriate expectations regarding privacy on the employers systems and property.

Other Federal Laws. A variety of other federal enactments have important implications for employers engaged in workplace surveillance. These include the Fair Credit Reporting Act, which governs investigative reports prepared by a third party for employment purposes, the Electronic Communications Privacy Act, the Stored Communications Act, and the Computer Fraud and Abuse Act, all of which have effects that may enable or limit surveillance depending on the facts and circumstances.

We will continue to blog about this important subject next week, offering some practical tips and best practices. Meanwhile, we encourage you to refer to the DEED/Gray Plant Mooty Social Media Guide that addresses many surveillance-related issues. The guide is available for free on GPM's website.