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Surprise Surprise, the NLRB Continues Expanding Employee Protections

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Imagine this: a nurse leaves the operating room during spinal surgery to participate in a union action, the employer terminates the nurse, and the National Labor Relations Board (NLRB) holds that the employer violated federal labor law by terminating the nurse. That is exactly what happened to a New York hospital recently when the Board compared the nurse's actions to a non-union employee who acted in a similar manner and was not disciplined, and found that the hospital violated the law. This is just one of many hard to believe examples of the NLRB's continued push to expand the protections offered to employees.

With the expanded focus on employee protection, a major area the NLRB continues to focus on is the expansion of what constitutes "protected concerted activity." One example of this expansion is that employers must be aware that behavior that looks on its face to be harassment may be considered protected concerted activity by the NLRB. Further, the NLRB has even suggested that a single employee's workplace complaint could constitute protected concerted activity. Over the last month, the NLRB has continued to push the limits on protecting employees and the expansion of protected concerted activity.

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Electronic Surveillance and Protected Concerted Activity

Section 7 of the National Labor Relations Act (NLRA) guarantees employees numerous rights including the right to engage in protected concerted activities for the purpose of collective bargaining or other mutual aid or protection. It is important to reinforce that Section 7 also applies to issues beyond union activity, and to non-unionized workplaces. Therefore, an employee does not have to be conversing about a topic that relates directly to working conditions in the traditional sense to be protected concerted activity. So, what exactly is electronic surveillance and does it infringe on employees' ability to engage in protected concerted activity?

Employers regularly implement surveillance in the workplace for a multitude of reasons. Most employers believe some form of workplace surveillance is necessary to ensure the safety and security of employees, that surveillance protects company property, and that it improves overall efficiency from its workforce. While some have questioned whether workplace surveillance is worth it with numerous studies showing that surveillance can have a negative effect on employee morale and productivity, employers continue to expand the use of surveillance. Overall, implementing surveillance in the workplace is a very complex issue for employers, but General Counsel Jennifer Abruzzo of the NLRB has made it very clear where the NLRB stands on the issue. Abruzzo has continued to forcibly push the pro-employee agenda by issuing GC memo 23-02. Abruzzo expresses her concerns that electronic surveillance by employers is impairing employees' ability to engage in protected concerted activity.

What type of electronic monitoring is Abruzzo most concerned with? In GC 23-02, Abruzzo refers to many forms of electronic monitoring, including but not limited to keyloggers and other monitoring

software, GPS tracking devices, cameras, radio-frequency identification badges, employer-issued phones or wearable devices with tracking capability, and artificial intelligence and algorithm-based decision-making tools, such as applicant personality tests.

Abruzzo claims that as more employers take advantage of electronic monitoring, these tools have the potential to impair or negate employees' ability to engage in protected concerted activity. While Abruzzo's memo did recognize that employers have legitimate business reasons for some forms of electronic monitoring, Abruzzo made it crystal clear where she stands on the issue and what she plans on doing about it. Abruzzo's memo promises to protect employees "to the greatest extent possible" by "vigorously enforcing extant law and by urging the Board to apply settled labor-law principles in new ways." In other words, Abruzzo is essentially urging the Board to find that it is a violation of the NLRA for employers to use electronic monitoring in a way that could interfere with or prevent employees from engaging in protected concerted activity.

The NLRB is not the first to tackle workplace surveillance. As we previously discussed here, some states are starting to weigh in by passing laws that limit employer monitoring, or require employers to notify employees that they are monitoring them. For example, New York now requires private employers to notify employees if they monitor or otherwise intercept phone conversations, email, or internet access or usage, or usage of any other electronic device or system. Other states have similar laws or are working to pass similar laws.

While it appears we are trending towards tighter enforcement of surveillance in the workplace, it is important for employers to understand that GC 23-02 is not currently the law, but merely a proposal and roadmap showing what the NLRB wants to become law. Employers should continue to comply with extant law regarding surveillance in the

workplace, particularly in their specific jurisdiction, and also ensure they have a business reason for such surveillance.

Deposition Questions Can Be Unfair Labor Practices?

The expansion of employee protections by the NLRB seems to know no bounds. Recently, an administrative law judge at the NLRB found that questions in a wage and hour deposition to determine if employees discussed pay concerns violated employees' right to confidentiality under the NLRA. While the line of questioning was fairly routine and standard – and is unquestionably relevant in a wage and hour deposition – this is just another example of how the NLRB is clamping down on employers. While the decision by the administrative law judge does not have a direct impact on employers, but instead on their attorneys, it does serve as another warning to employers that the NLRB is stepping up its push to protect employees in ways that we have never seen, and likely have never even thought of.

As always, Akerman attorneys will continue to monitor changes in NLRB guidance and policies. For any labor or workforce concerns, contact your Akerman labor attorney for further information and guidance.
