COLLECTIVE BARGAINING CONSIDERATIONS FOR MONITORING TECHNOLOGY

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Michael G. McNally
Felhaber Larson
mmcnally@felhaber.com
(612) 373-8516

This paper provides an overview of the law under the National Labor Relations Act concerning use of technology to monitor employees and employer property. There has been considerable technological innovation from the use of simple cameras in a facility, to GPS devices in trucks or on cellphones, to vehicle cameras, to 'smart' hard hats. As the use of these technologies becomes more commonplace, contractors should understand their collective bargaining obligations before implementing, or updating, employee and employer property monitoring methods.

Privacy laws that vary by state may apply to these technologies are beyond the scope of this discussion, but should nonetheless be reviewed and considered when using monitoring technologies.

I. Background on Bargaining

A. Mandatory Subjects of Bargaining

In general, Section 8(a)(5) of the Act, in conjunction with Section 8(d), mandates employers to bargain in good faith about wages, hours and other terms and conditions of employment.[1] An employer, whose employees are represented for collective bargaining purposes, commits an unfair labor practice by making a change to a mandatory subject of bargaining without first providing the designated collective bargaining representative an opportunity to bargain about such changes.[2] The change must be a "material, substantial and a significant" one.[3]

In construing what items fall within the perview of mandatory subjects of bargaining, the National Labor Relations Board has focused exclusively on matters that are "plainly germane to the working environment" and "not among those 'managerial decisions' which lie at the core of entrepreneurial control."[4]

B. "Plainly Germane to the Working Environment"

The Board has held that matters which have the potential to affect the job security of employees are "plainly germane to the working environment." This includes drug and alcohol testing[5], physical examinations for employees with bad absentee records[6],

[1] *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958)
[2] *NLRB v. Katz*, 369 U.S. 736 (1962)
[3] *Murphy Diesel Co.*, 184 NLRB 757 (1970)
[4] *Ford Motor Co. v. NLRB*, 441 U.S. 488
[5] *Johnson-Bateman Co.*, 295 NLRB 180 (1989)
[6] *LeRoy Machine Co., Inc.*, 147 NLRB 1431 (1964)

polygraph testing[7], disciplinary procedures for tardiness[8], installation of timeclocks[9] and removal of timeclocks to self-reporting.[10]

II. Development of the Body of Law on Monitoring

A. Video Surveillance

The NLRB first waded into this area in 1997 when it decided that the use of hidden surveillance cameras constitutes a mandatory subject of bargaining. The factual backdrop and the Board's reasoning in this decision are important to understanding how the law developed from this point.

In *Colgate-Palmolive Company* the employer placed surveillance cameras either in plain view of employees or, from time to time, "strategically placed in other areas in response to reasonably suspected misconduct."[11] The cameras in plain view were used to survey activity on company property and the hidden cameras were installed due to thefts or other suspected misconduct.

The Board held that the use of the hidden cameras constituted a mandatory subject of bargaining because "it affects the privacy rights of employees and has the potential to affect the continued employment of employees who become concerned that their every action is subject to hidden surveillance or who become subject to discipline." The Board found that the hidden cameras were outside the scope of managerial decisions that lie at the core of entrepreneurial control, and impinged on employment security.

Subsequent decisions from the Seventh Circuit and District of Columbia Circuit Courts, relying upon the *Colgate-Palmolive* ruling, held that installation of hidden surveillance cameras in the workplace constitutes a mandatory subject of bargaining, and in the absence of such bargaining, constitutes an unfair labor practice.[12]

However, in an Advice Memorandum, the General Counsel concluded that the use of videotaping to investigate workers compensation fraud did not involve a substantial change in employees' terms and conditions of employment, since the employer had a

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[7] *Medicenter, Mid-South Hospital*, 221 NLRB 670 (1975)
[8] *Murphy Diesel Co., supra.*
[9] *Nathan Littauer Hospital Ass'n.*, 229 NLRB 1122 (1977)
[10] *Vincent Industrial Plastics*, 328 NLRB 300 (1999)
[11] 323 NLRB 515 (1997)
[12] *National Steel Corp. v. NLRB*, 324 F.3d 928 (7th Cir. 2003); *Brewers and Malsters Local Union # 6 v. Anheuser-Busch, Inc.*, 414 F.3d 36 (D.C. Cir. 2005)

practice and policy of investigating fraud through private investigators away from the workplace.[13] The General Counsel distinguished these facts from *Colgate-Palmolive* because the employer in that case "had not conducted any similar type of surveillance before installing the video cameras." Although furtive videotaping of individuals closely parallels hidden surveillance cameras, because the employer had previously investigated workers compensation fraud through a private investigator, this was not a substantial deviation from the prior practice.

B. Vehicle Data Recorders and GPS Systems

The NLRB and the General Counsel's Division of Advice have addressed the issue of GPS devices in several instances.

In *Roadway Express, Inc.,* an Advice Memorandum, the General Counsel's Office concluded that an employer did not commit a unilateral change in violation of § 8(a)(5) when it switched from a two-way radio system used to monitor truck drivers to GPS technology.[14] The General Counsel concluded that the implementation of the GPS did not rise to a "significant and substantial change" because the new system was simply a newer technological method of obtaining the same information.

Several years later, the General Counsel's Office considered installation of a vehicle data recorder system that included GPS technology in company vehicles in *BP Exploration of Alaska, Inc.*[15] The General Counsel found that the technology constitutes a mandatory subject of bargaining, citing *Colgate-Palmolive*, and that the implementation caused a substantial and significant change to employees' terms and conditions of employment because it greatly increased the likelihood of employee discipline. Contrasted with *Roadway Express,* the devices were new, and not merely a technological update.

The General Counsel's Office in *Shore Point Distribution Co., Inc*. again considered the installation of a GPS device in the truck of an employee who was suspected of stealing time based upon his route times exceeding those of other employees.[16] The company had a past practice, to which the Union did not object, of hiring a private investigator to follow employees suspected of stealing time. The Board acknowledged its prior precedent that installation of a GPS device constitutes a mandatory subject of bargaining, but found that the GPS device was merely a mechanical method that assisted in the

[13] *PPG, Inc.*, Case 6-CA-33492 (Nov. 3, 2003)
[14] Case 13-CA-39940-1 (April 15, 2002)
[15] Case 19-CA-29566 (July 11, 2005)
[16] Case 22-CA-151053 (Oct 15, 2015)

enforcement of an established policy and therefore was not a material, substantial or significant change.

Important to reconciling these holdings is the principle that merely utilizing newer technological innovations to replace outdated monitoring methods does not give rise to the obligation to bargain.

C. Timeliness

Under § 10(b) of the Act, for a Complaint to issue, an unfair labor practice charge must be filed within 6 months of the occurrence. The clock begins when a person has actual or constructive knowledge of conduct that gives rise to an unfair labor practice.[17]

With that as a general principle, there is not much law that has developed regarding the timeliness of unfair labor practices relating to the use of monitoring technology.

In *Precoat Metals* the Regional Director declined to issue a Complaint where the surveillance cameras were installed 9 years ago, finding that "the Union did not request to bargain over the installation and use of the cameras then and have not done so since the Employer took over operations about two years ago" and the Employer had previously used video from a camera as evidence of employee misconduct.[18]

D. Deferral to Grievance Arbitration Procedure

The NLRB has a policy of deferring statutory allegations to the arbitral process as a means for giving full effect to the parties' agreement to resolve disputes through arbitration, and not substituting the Board's processes for their own mutually agreed-upon method for dispute resolution.

When considering whether an unfair labor practice should be deferred to the parties' bargained for dispute resolution procedure, the Board considers whether the following criteria are met:

1. The dispute arose within the confines of a long and productive relationship;
2. There is no claim of employer animosity to the employees' exercise of protected rights;
3. The parties' contract provides for arbitration in a very broad range of disputes;

[17] *Adair Standish Corp.*, 295 NLRB 985 (1989); *Carpenters Wisconsin River Valley Council*, 211 NLRB 222 (1974)

[18] Case 25-CA-137437 (Feb. 6, 2015)

4. The arbitration clause clearly encompasses the dispute at issue;
5. The employer has asserted its willingness to utilize arbitration to resolve the dispute; and
6. The dispute is eminently well-suited to such resolution.[19]

In certain cases, depending upon the terms of the collective bargaining agreement, in particular the management rights clause, and the parties' past practice, the Board has deferred claims of improper monitoring to arbitration.[20]

III. Suggestions for Bargaining Over Use of Monitoring Technology

A. Give Notice

Advise the Union that:

1. You are "making plans" to purchase and install monitoring devices;
2. You desire or intend to have these devices installed and in-use by a specific date; and
3. The Union should contact you if they have any questions or concerns, or wish to meet, regarding the plans that you are making.

B. Consider items to bargain over

If the Union seeks to bargain over the use of monitoring technology, be prepared to identify certain conditions that would be acceptable for use, such as employees must be informed of the use of the cameras or device, how they work, what information it will show the employer, and what the employer will do with that information. It may also be appropriate to combine that with a clear reminder of the company's policy on use of company vehicles by employees, and the penalties for impermissible use, in the case of technology for vehicles, or expectations for productivity, efficiency and minimizing idle time, in the case of technology for facilities or jobsites.

C. Implementation

Should you be unable to reach an agreement with the Union on the use of monitoring technology, and have negotiated to the point of impasse, you can implement the use according to the terms last proposed in negotiations.

[19] *United Technologies*, 268 NLRB 557 (1984)

[20] *See e.g. Haggins v. Verizon New England, Inc.*, 648 F.3d 50 (1st Cir. 2011)

This is not to suggest that a Union could not file a grievance against you for installing the technology or seek to exclude evidence gained from the technology in an employee discipline grievance.