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Employee Privacy: Key Considerations for Monitoring Your Employees

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Advancements in reliability and accessibility of technology have provided employers with new opportunities to improve workforce productivity. However, given the scope and volume of data that can now be captured by modern technology used to monitor employee activity, legislators and regulators are taking actions to address employee privacy concerns. Therefore, employers need to know the legal landscape before implementing specific technology and consider whether the technology's benefits outweigh the potential legal risks.

In a relatively short time span, biometric scans went from the stuff of sci-fi movies to a commonly used tool used by employers for timekeeping and security purposes. Because of the increased use of biometric data in employment and beyond, states are starting to regulate the collection and use of this type of data. Most notably is Illinois' Biometric Information Privacy Act, which passed in 2008. This law requires companies that collect or possess biometric data to maintain a publicly available privacy policy which must include a schedule and guidelines for destroying the biometric data collected. Illinois companies also must provide notice and obtain consent before collecting biometric data and cannot sell or otherwise profit from biometric data. Class action lawsuits for non-compliance may result in $1,000 for each negligent violation and $5,000 for each intentional violation. Other states are following Illinois' lead. In January 2023 alone, nine states (Arizona, Hawaii, Maryland, Massachusetts, Minnesota, Mississippi, New York, Tennessee, and Vermont) have introduced biometric data legislation. Therefore, before implementing any biometric technology, employers would be well-served to check state law for potential compliance hurdles.

Employers have long maintained right to control their own electronic equipment and limit employee privacy expectations when employees use company-provided electronic devices. To preserve this right, employers must have a policy that informs employees that they do not have any expectation of privacy when using company-provided electronic equipment, even when the employee is using the electronic device for personal use. However, the National Labor Relations Board is seeking to limit the right of employers to monitor employee activity through electronic devices. The NLRB has taken the position, which has been the subject of much litigation of the years, that employers may not use electronic monitoring in response to protected-concerted activity or to otherwise obtain information about the employees' activities to organize and bargain collectively.

Jennifer Abruzzo, NLRB General Counsel, recently issued Memorandum GC 23-02 in which she indicated she will "urge the Board to adopt a new framework for protecting employees from intrusive or abusive forms of electronic monitoring and automated management that interfere with Section 7 activity." She concluded, "close, constant surveillance and management through electronic means threaten employees' basic ability to exercise their rights." Given this, employers monitoring even company-owned electronic devices should proceed with caution and consider whether the device *could* interfere with employees' right to engage in protected concerted activity. Also, electronic surveillance should be carefully considered and utilized only when necessary to protect employer legitimate business interests. Employers should also recall that the NLRB is not only enforcing Section 7 rights in unionized workforces but also against unsuspecting employers with non-union facilities. Given the NLRB's recent pronouncements promising the advancement of employee rights in the workplace, employers may be in for a bumpy ride.

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