

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 23-02

October 31, 2022

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Electronic Monitoring and Algorithmic Management of Employees
Interfering with the Exercise of Section 7 Rights

Recent technological advances have dramatically expanded employers' ability to monitor and manage employees within the workplace and beyond. As more and more employers take advantage of those new capabilities, their practices raise a number of issues under the Act. An issue of particular concern to me is the potential for omnipresent surveillance and other algorithmic-management tools to interfere with the exercise of Section 7 rights by significantly impairing or negating employees' ability to engage in protected activity and keep that activity confidential from their employer, if they so choose.¹ Thus, I plan to urge the Board to apply the Act to protect employees, to the greatest extent possible, from intrusive or abusive electronic monitoring and automated management practices that would have a tendency to interfere with Section 7 rights. I will do so both by vigorously enforcing extant law and by urging the Board to apply settled labor-law principles in new ways, as described below.

It is well documented that employers are increasingly using new technologies to closely monitor and manage employees.² In warehouses, for example, some employers record

¹ In this memorandum, I use the term "automated management" or "algorithmic management" to refer to "a diverse set of technological tools and techniques to remotely manage workforces, relying on data collection and surveillance of workers to enable automated or semi-automated decision-making." Alexandra Mateescu & Aihua Nguyen, *Explainer: Algorithmic Management in the Workplace*, Data & Society Research Institute (Feb. 2019), available at https://datasociety.net/wp-content/uploads/2019/02/DS_Algorithmic_Management_Explainer.pdf.

² Danielle Abril, *Your Boss Can Monitor Your Activities Without Special Software*, Washington Post (Oct. 7, 2022), available at <https://www.washingtonpost.com/technology/2022/10/07/work-app-surveillance/>; Jo Constantz, *"They Were Spying On Us": Amazon, Walmart, Use Surveillance Technology to Bust Unions*, Newsweek (Dec. 13, 2021), available at <https://www.newsweek.com/they-were-spying-us-amazon-walmart-use-surveillance-technology-bust-unions-1658603>; Richard A. Bales & Katherine V. W. Stone, *The Invisible Web at Work: Artificial Intelligence and Electronic Surveillance in the Workplace*, 41 Berkeley J. Emp. & Lab. L. 1, 16-22 (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3410655; Charlotte Garden, *Labor*

workers' conversations and track their movements using wearable devices, security cameras, and radio-frequency identification badges.³ On the road, some employers keep tabs on drivers using GPS tracking devices and cameras.⁴ And some employers monitor employees who work on computers—whether in call centers, offices, or at home—using keyloggers and software that takes screenshots, webcam photos, or audio recordings throughout the day.⁵

Electronic monitoring and automated management are not always limited to working time. After the workday ends, some employers continue to track employees' whereabouts and communications using employer-issued phones or wearable devices, or apps installed on workers' own devices.⁶ And even before the employment relationship begins, some employers pry into job applicants' private lives by conducting personality tests and scrutinizing applicants' social media accounts.⁷

Importantly, advances in artificial intelligence and algorithm-based decision-making in recent years have made it possible for employers to analyze, sell or otherwise share, and act on the voluminous data that new technologies generate.⁸ Some employers use that

Organizing in the Age of Surveillance, 63 St. Louis U. L.J. 55, 56-57 (2018), available at <https://scholarship.law.slu.edu/lj/vol63/iss1/5/>. See also Kate Bronfenbrenner, Testimony before the United States House Committee on Education and Labor, *In Solidarity: Removing Barriers to Organizing*, Cornell School of Indus. and Labor Relations, at 11-12 (Sept. 14, 2022), available at <https://ecommons.cornell.edu/handle/1813/111838> (noting increase in electronic surveillance during union campaigns).

³ Bales & Stone, *supra*, at 17, 20; Garden, *supra*, at 57.

⁴ Kathryn Zickuhr, *Workplace Surveillance Is Becoming the New Normal for U.S. Workers*, Wash. Ctr. for Equitable Growth, at 4 (Aug. 2021), available at <https://equitablegrowth.org/research-paper/workplace-surveillance-is-becoming-the-new-normal-for-u-s-workers/>.

⁵ Garden, *supra*, at 56. See Letter from Rep. Robert “Bobby” Scott, Chairman, Committee on Education and Labor, U.S. House of Representatives, to Gene Dodaro, Comptroller, GAO (Oct. 5, 2022), available at <https://edlabor.house.gov/download/scott-letter-to-gao-re-bossware> (discussing “bossware” technology used to monitor employees in telework and office settings).

⁶ See Emma Oppenheim, *Shining a Spotlight on Workers' Financial Experiences*, CFPB (Mar. 9, 2022), available at <https://www.consumerfinance.gov/about-us/blog/shining-a-spotlight-on-workers-financial-experiences/>; Bales & Stone, *supra*, at 20-22.

⁷ Bales & Stone, *supra*, at 10-15.

⁸ *Id.*; *Policy Statement on Enforcement Related to Gig Work*, FTC, at 10 (Sept. 15, 2022), available at <https://www.ftc.gov/legal-library/browse/policy-statement-enforcement-related-gig-work>.

data to manage employee productivity, including disciplining employees who fall short of quotas, penalizing employees for taking leave, and providing individualized directives throughout the workday.⁹

Under settled Board law, numerous practices employers may engage in using new surveillance and management technologies are already unlawful. In cases involving employer observation of open protected concerted activity and public union activity like picketing or handbilling, the Board has recognized that “pictorial recordkeeping tends to create fear among employees of future reprisals.”¹⁰ The Board accordingly balances an employer’s justification for surveillance “against the tendency of that conduct to interfere with employees’ right to engage in concerted activity.”¹¹ In that context, “the Board has long held that absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate.”¹²

In addition, it is well established that an employer violates Section 8(a)(1) if it institutes new monitoring technologies in response to activity protected by Section 7; utilizes technologies already in place for the purpose of discovering that activity, including by reviewing security-camera footage or employees’ social-media accounts; or creates the impression that it is doing such things.¹³ Employer surveillance of Section 7 activity is

⁹ Annette Bernhardt, Lisa Kresge & Reem Suleiman, *Data & Algorithms at Work: The Case for Worker Technology Rights*, UC Berkeley Labor Center, at 6 (Nov. 2021), available at <https://laborcenter.berkeley.edu/data-algorithms-at-work/>; Jodi Kantor, Karen Weise & Grace Ashford, *The Amazon That Customers Don’t See*, New York Times (June 15, 2021), available at <https://www.nytimes.com/interactive/2021/06/15/us/amazon-workers.html>; Zickuhr, *supra*, at 20; Bales & Stone, *supra*, at 17-18. Although the trend is visible across the national economy, the rising use of intrusive monitoring and management technologies disproportionately affects low-wage workers, workers of color, immigrants, and women, who are more likely to work in heavily tracked positions in warehousing, package delivery, and call centers. Bernhardt, Kresge & Suleiman, *supra*, at 15; Zickuhr, *supra*, at 12.

¹⁰ *Brasfield & Gorrie, LLC*, 366 NLRB No. 82, slip op. at 5 (2018) (quoting *National Steel & Shipbuilding Co.*, 324 NLRB 499, 499 (1997), *petition for review denied*, 156 F.3d 1268 (D.C. Cir. 1998)).

¹¹ *F.W. Woolworth Co.*, 310 NLRB 1197, 1197 (1993) (citations and internal quotation marks omitted).

¹² *Id.*

¹³ See, e.g., *National Captioning Institute*, 368 NLRB No. 105, slip op. at 5 (“It is well settled that an employer commits unlawful surveillance if it acts in a way that is out of the ordinary in order to observe union activity.”); *AdvancePierre Foods, Inc.*, 366 NLRB No. 133, slip op. at 2 n.4, 15-16 (2018) (employer’s review of break-room security-camera footage to observe employee distribution of union literature was unlawful

unlawful whether it is carried out openly or covertly¹⁴ and certain conduct can be unlawful even if it merely creates an impression of surveillance.¹⁵ An employer who spends money on surveillance technology “to obtain information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer,” or otherwise expends money to interfere with, restrain, or coerce employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing, must generally file a Form LM-10, reporting the expenditure to the U.S. Department of Labor’s Office of Labor-Management Standards.¹⁶

It is clear under extant law that employers violate Section 8(a)(1) if they discipline employees who concertedly protest workplace surveillance or the pace of work set by algorithmic management.¹⁷ Employers also violate Section 8(a)(1) if they coercively question employees with personality tests designed to evaluate their propensity to seek

surveillance), *enforced*, 966 F.3d 813 (D.C. Cir. 2020); *National Captioning Institute, Inc.*, 368 NLRB No. 105, slip op. at 5 (2019) (“intentional monitoring of pro-union employees’ Facebook postings” violates the Act); *Mek Arden, LLC*, 365 NLRB No. 109, slip op. at 19 (2017) (employer unlawfully created impression of surveillance by stating that voice-activated security cameras were monitoring union activity), *enforced*, 755 F. App’x 12 (D.C. Cir. 2018).

¹⁴ *NLRB v. Grower-Shipper Vegetable Ass’n*, 122 F.2d 368, 376 (9th Cir. 1941).

¹⁵ *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005) (“In determining whether an employer has unlawfully created the impression of surveillance of employees’ union activities, the test that the Board has applied is whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance.”), *enforced*, 181 F. App’x 85 (2d Cir. 2006).

¹⁶ 29 USC § 433(a)(3). See OLMS Fact Sheet, Form LM-10 Employer Reporting: Transparency Concerning Persuader, Surveillance, and Unfair Labor Practice Expenditures, at 3, *available at* https://www.dol.gov/sites/dolgov/files/OLMS/regs/compliance/LM10_FactSheet.pdf (describing obligation to report expenditures on “[s]urveillance equipment or other technology used to surveil and the time spent on installing, operating, and monitoring it, as well as analyzing the information the equipment produces” among others). OLMS relies on Board findings in enforcing these reporting requirements. To promote compliance in cases that do not proceed to a Board decision, Regions should add the following language to settlement proposals in appropriate cases: “The Charged Party will report to the U.S. Department of Labor, Office of Labor-Management Standards, via its Form LM-10, the amount of any payments or expenditures made in conjunction with the conduct at issue in this case.”

¹⁷ See *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 15 (1962) (employees’ walkout to protest working conditions was protected); *Accel, Inc.*, 339 NLRB 1052, 1052 (2003) (employer unlawfully discharged employees for protesting requirement to work through a scheduled break).

union representation.¹⁸ And employers violate Section 8(a)(1) if they dismantle or preclude employee conversations or isolate union supporters or discontented employees to prevent Section 7 activity.¹⁹

Further, if employers rely on artificial intelligence to screen job applicants or issue discipline, the employer—as well as a third-party software provider—may violate Section 8(a)(3) if the underlying algorithm is making decisions based on employees' protected activity.²⁰ Employers also violate Section 8(a)(3) by discriminatorily applying production quotas or efficiency standards to rid themselves of union supporters.²¹ Finally, where employees have union representation, employers violate Section 8(a)(5) if they fail to provide information about, and bargain over, the implementation of tracking technologies and their use of the data they accumulate.²²

In addition to zealously enforcing the foregoing precedent, I 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. It is the Board's responsibility "to adapt the Act to changing patterns of industrial life."²³ An employer's right to oversee and manage its operations with new technologies is "not

¹⁸ See *Facchina Construction, Co.*, 343 NLRB 886, 886 (2004) (employer violated the Act by questioning job applicant about union membership), *enforced*, 180 F. App'x 178 (D.C. Cir. 2006); *Allegheny Ludlum Corp.*, 333 NLRB 734, 740 (2001) (an employer engages in unlawful polling by forcing an employee to make "an observable choice that demonstrates their support for or rejection of the union"), *enforced*, 301 F.3d 167 (3d Cir. 2002).

¹⁹ See *Trus Joist MacMillan*, 341 NLRB 369, 373 (2004) (employer violated Section 8(a)(1) by restricting employee's movements within facility during working time "to curtail employees' union discussions").

²⁰ See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 186-87 (1941) (discrimination in hiring against union supporters violates the Act); *Blankenship & Associates*, 306 NLRB 994, 995 (1992) (entering order against consultant acting as employer's agent).

²¹ See *Roemer Industries*, 367 NLRB No. 133, slip op. at 17 (2019) (finding employer's claim that it discharged union supporter for inefficiency to be pretextual), *enforced*, 824 F. App'x 396 (6th Cir. 2020).

²² See *Anheuser-Busch, Inc.*, 342 NLRB 560, 560 (2004) (employer violated the Act by failing to bargain with union prior to installation and use of surveillance cameras in the workplace), *enforced in pertinent part sub nom. Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36 (D.C. Cir. 2005). See generally Lisa Kresge, *Union Collective Bargaining Agreement Strategies in Response to Technology*, Working Paper, UC Berkeley Labor Center (Nov. 2020), available at <https://laborcenter.berkeley.edu/wp-content/uploads/2022/01/Working-Paper-Union-Collective-Bargaining-Agreement-Strategies-in-Response-to-Technology-v2.pdf> (discussing collective-bargaining-agreement provisions addressing employers' use of technology in the workplace).

²³ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

unlimited in the sense that [it] can be exercised without regard to any duty which the existence of rights in others may place upon [the] employer.”²⁴ Rather, it is up to the Board to work out an “adjustment” between the interests of management and labor that guarantees employees a meaningful “[o]pportunity to organize.”²⁵ Consistent with the Board’s statutory role, I will urge the Board to ensure that intrusive or abusive methods of electronic surveillance and automated management do not unlawfully interfere with, restrain, or coerce employees in the exercise of their Section 7 rights by stopping union and protected concerted activity in its tracks or preventing its initiation.²⁶

The framework I will advocate is grounded in well-settled Board principles. The Board has held, with the Supreme Court’s approval, that “the right of employees to self-organize and bargain collectively established by [Section 7] necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.”²⁷ The workplace “is the one place where employees clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.”²⁸ Employers cannot lawfully prevent discussions about such matters, even during working time, if (as is often the case) they permit other kinds of non-work discussions.²⁹ And “time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee’s time to use as [the employee] wishes without unreasonable restraint, although the employee is on company property.”³⁰

In addition, both inside and outside of the workplace, “[t]he confidentiality interests of employees have long been an overriding concern to the Board.”³¹ Because employers so commonly retaliate against employees for exercising their Section 7 rights, the Board recognizes, with court approval, that a “right to privacy” is “necessary to full and free

²⁴ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945).

²⁵ *Id.*

²⁶ *Cf. Parexel International, LLC*, 356 NLRB 516, 519-20 (2011) (finding unlawful a “preemptive strike” discharge that prevented employees “from discussing, and possibly inquiring further or acting in response to, substandard wages or perceived wage discrimination”).

²⁷ *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978).

²⁸ *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978) (quoting *Gale Products*, 142 NLRB 1246, 1249 (1963)) (brackets omitted).

²⁹ *Sysco Grand Rapids, LLC*, 367 NLRB No. 111, slip op. at 26 (2019), *enforced in pertinent part*, 825 F. App’x 348 (6th Cir. 2020).

³⁰ *Republic Aviation*, 324 U.S. at 803 n. 10 (1945) (quoting *Peyton Packing Co.*, 49 NLRB 828, 843 (1943)).

³¹ *National Telephone Directory Corp.*, 319 NLRB 420, 421 (1995).

exercise of the organizational rights guaranteed by the [Act].”³² The Board, accordingly, holds that “Section 7 of the Act gives employees the right to keep confidential their union activities,”³³ and it “zealously seeks to protect the confidentiality interests of employees.”³⁴ In short, “employees should be free to participate in union organizing campaigns [or other protected concerted activity] without the fear that members of management are peering over their shoulders, taking note of who is involved in [Section 7] activities, and in what particular ways.”³⁵

Close, constant surveillance and management through electronic means threaten employees’ basic ability to exercise their rights. In the workplace, electronic surveillance and the breakneck pace of work set by automated systems may severely limit or completely prevent employees from engaging in protected conversations about unionization or terms and conditions of employment that are a necessary precursor to group action.³⁶ If the surveillance extends to break times and nonwork areas, or if excessive workloads prevent workers from taking their breaks together or at all, they may be unable to engage in solicitation or distribution of union literature during nonworking time.³⁷ And surveillance reaching even beyond the workplace—or the use of technology that makes employees reasonably fear such far-reaching surveillance—may prevent employees from exercising their Section 7 rights anywhere.

I am mindful that some employers may have legitimate business reasons for using some forms of electronic monitoring and automated management. But to the extent that employers have a legitimate need to electronically monitor and direct employees in ways that could inhibit Section 7 activity, the employer’s interests must be balanced against

³² *Pac. Molasses Co. v. NLRB Reg’l Off. No. 15*, 577 F.2d 1172, 1182 (5th Cir. 1978).

³³ *Guess?, Inc.*, 339 NLRB 432, 434 (2003). *Accord Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267, 1274 (D.C. Cir. 2012).

³⁴ *Wright Elec., Inc. v. NLRB*, 200 F.3d 1162, 1165 (8th Cir. 2000). *Accord United Nurses Ass’ns of Cal. v. NLRB*, 871 F.3d 767, 785 (9th Cir. 2017).

³⁵ *Flexsteel Industries*, 311 NLRB 257, 257 (1993).

³⁶ *See Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1206 n.10 (2014) (noting that “discussions of wages are often preliminary to organizing or other action for mutual aid or protection”). *Cf. Spring Valley Hospital Medical Center*, 363 NLRB 1766, 1766 n.3, 1782 (2016) (adopting, in absence of exceptions, judge’s finding that employer violated Section 8(a)(1) by requiring employees to speak English only, which limited employees’ “ability to freely discuss and communicate about work conditions, wages and other terms and conditions of employment”).

³⁷ *See Peyton Packing*, 49 NLRB at 843 (absent special circumstances, employers must allow their employees to engage in union solicitation on employer premises during nonwork time), *enforced*, 142 F.2d 1009 (5th Cir. 1944); *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 620 (1962) (employees generally may distribute union-related literature on their employer’s premises, but the employer may restrict the distribution to nonwork areas).

employees' rights under the Act.³⁸ The Board must reach an accommodation between competing employer interests and employee rights "with as little destruction of one as is consistent with the maintenance of the other."³⁹

Thus, in appropriate cases, I will urge the Board to find that an employer has presumptively violated Section 8(a)(1) where the employer's surveillance and management practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act. If the employer establishes that the practices at issue are narrowly tailored to address a legitimate business need—i.e., that its need cannot be met through means less damaging to employee rights—I will urge the Board to balance the respective interests of the employer and the employees to determine whether the Act permits the employer's practices. If the employer's business need outweighs employees' Section 7 rights, unless the employer demonstrates that special circumstances require covert use of the technologies, I will urge the Board to require the employer to disclose to employees the technologies it uses to monitor and manage them, its reasons for doing so, and how it is using the information it obtains. Only with that information can employees intelligently exercise their Section 7 rights and take appropriate measures to protect the confidentiality of their protected activity if they so choose.⁴⁰

The foregoing framework is consistent with the approach I have advocated in cases where an employer maintains facially neutral work rules that could interfere with the exercise of Section 7 rights.⁴¹ In those circumstances, as here, I have urged the Board to evaluate the effect of employer rules on a reasonable employee who is in a position of economic vulnerability, taking into account the totality of the surrounding circumstances.⁴² And in doing so, I have urged the Board to give full consideration to employers' business needs, and to "permit[] employers to maintain narrowly tailored rules that infringe on employees' Section 7 rights in the limited circumstances where conflicting legitimate business interests outweigh those rights."⁴³ In the same way, with regard to investigative-confidentiality rules, I have urged the Board to permit restrictions on statutorily protected

³⁸ See *Guess?*, 339 NLRB at 434-35 (balancing employer's legitimate need for information against employees' Section 7 right to keep union activities confidential).

³⁹ *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

⁴⁰ In addition, I will consider whether other safeguards or assurances are necessary to protect employees' Section 7 rights. See, e.g., Garden, *supra*, at 67-68 (discussing proposals to require employers to limit who may access information obtained through electronic surveillance and algorithmic management, and to permit employees to respond before imposing discipline based on such information).

⁴¹ See *generally Stericycle, Inc.*, Case Nos. 04-CA-137660 et al., Brief to the Board dated Mar. 7, 2022.

⁴² *Id.* at 3, 12.

⁴³ *Id.* at 4, 13.

employee communications “only when legitimate and substantial justifications outweigh employees’ Section 7 rights in a particular investigation.”⁴⁴

Finally, I note that I am committed to an interagency approach to these issues, as numerous agencies across the federal government are working to prevent employers from violating federal law using electronic surveillance and algorithmic management technologies. Through those efforts, agencies including the Federal Trade Commission, the Consumer Financial Protection Bureau, Department of Justice, Equal Employment Opportunity Commission, and the Department of Labor are working to combat a range of harms employers inflict on workers using such technologies, from discrimination in hiring and work assignments, to misclassification of employees as independent contractors, to other unfair or deceptive pay practices, to selling or sharing workers’ personal data, to injuries caused by overwork and repetitive motions.⁴⁵ Recent agreements that we have signed with many of these agencies will facilitate information sharing and coordinated enforcement on these issues.⁴⁶

Consistent with the principles set forth above, Regions should vigorously enforce extant Board law in cases involving new workplace technologies. In addition, Regions should submit to Advice any cases involving intrusive or abusive electronic surveillance and algorithmic management that interferes with the exercise of Section 7 rights.

/s/
J.A.A.

⁴⁴ *Id.* at 16.

⁴⁵ See Press Release, Justice Department and EEOC Warn Against Disability Discrimination (May 12, 2022), *available at* <https://www.justice.gov/opa/pr/justice-department-and-eeoc-warn-against-disability-discrimination> (discussing technical assistance document concerning disability discrimination resulting from the use of artificial intelligence and algorithmic decision-making); FTC Policy Statement on Enforcement Related to Gig Work, *supra* (discussing FTC’s enforcement priorities in relation unfair and deceptive practices involving surveillance and algorithm-based decision-making, and exclusionary or predatory conduct by dominant firms that may unlawfully create or maintain a monopoly or a monopsony resulting poorer working conditions for gig workers); Oppenheim, *supra* (noting CFPB’s intention to closely monitor the collection and sale of workers’ data and assess where provisions of the Fair Credit Reporting Act and other consumer protection laws may protect workers).

⁴⁶ See NLRB Interagency Memoranda of Understanding, *available at* <https://www.nlr.gov/guidance/key-reference-materials/interagency-international-collaboration/interagency-MOUs>.