



Workplace Privacy Requirements Under the National Labor Relations Act Affect All Employers

By Suzanne V. Delaney and Thomas R. Revnew

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Employers are facing increased legal requirements in their efforts to monitor employees. Most employers are aware of the privacy requirements for medical and Social Security information, as well as the requirements applicable to lawful searches of an employee's office or personal property and lawful workplace investigations. However, the scope of workplace privacy goes far beyond these issues. Oftentimes, employers overlook important employee privacy issues in efforts to protect the employer's confidential information, or in monitoring employee performance or conduct. In addition, employers often overlook their obligations to comply with the provisions of the National Labor Relations Act ("NLRA"), which can result in unfair labor practice charges for privacy-related violations.

Employee Discipline: As an example of the risks that employers face, the U.S. Court of Appeals for the District of Columbia Circuit recently held that an employer's use of video cameras to monitor employees constituted an unfair labor practice because the employer did not bargain with the union over the placement of the cameras. In that case, as a result of concerns about on-the-job employee drug use, Anheuser-Busch installed hidden video cameras in an area where employees often took breaks. Five workers were terminated when the cameras showed them smoking marijuana, four were suspended for leaving their work areas, and seven others were given "last-chance" agreements after being observed sleeping or urinating on the building's roof. The union objected to the discipline, arguing that the misconduct would not have been known to the company absent the existence of the hidden cameras, which had not been negotiated with the union.

The National Labor Relations Board ("NLRB") ruled that the employees were not entitled to reinstatement or back pay because the company had good cause to discipline them, irrespective of the legality of the cameras themselves. The Court of Appeals, however, held that Anheuser-Busch would not have known about the misconduct without viewing the videotapes. Since the court found that the installation of the cameras, without bargaining with the union, constituted an unfair labor practice, it remanded the case back to the NLRB to determine the remedies to which the employees were entitled.

While video surveillance is a helpful way of identifying employee misconduct, all employers should carefully consider the location and placement of any hidden cameras (or other surveillance), and unionized employers should review relevant union agreements and consider their bargaining obligations related to video surveillance and other privacy issues to avoid the risk of an unfair labor practice charge and a possible reversal of any employee discipline based on the surveillance.

While this case involved a union employer and a legal bargaining obligation, non-union employers are also subject to NLRB charges for "surveillance" or "interrogation" of employees related to their collective action (not just union organizing).

Confidential Information: Employee handbooks frequently contain a section outlining the employer's prohibition against employees disclosing confidential information and trade secrets. A broad prohibition that restricts workers from discussing confidential informa-

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the lawyers for employers

Alec J. Beck
John F. Bowen
Marc T. Chrismser
Suzanne V. Delaney
Charles E. Feuss
Robin N. Kelleher
Shareen R. Luze
Gregory L. Peters
Thomas R. Revnew
Douglas P. Seaton
Robert Grossman,
of counsel

7300 Metro Blvd, #500
Minneapolis, MN 55439
Tel 952-896-1700
Fax 952-896-1704
www.seatonlaw.com

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tion relating to the company's employees, however, can be a violation of the employees' rights under the NLRA.

In July 2005, the NLRB held that a broad "confidential information" provision within Cintas Corp.'s employee reference guide interfered with the "employees' right to engage in concerted activity" because the policy indicated that employees could be disciplined for disclosing confidential information. Although the policy did not specifically restrict the employees' rights to discuss the terms and conditions of their employment, the NLRB held that the policy could have a "chilling effect" on employees' seeking to exercise their rights to engage in concerted activity and to discuss the terms and conditions of their employment. As the Cintas decision held, employers who discipline their employees for discussing the terms and conditions of their employment with others, including disclosing their salary and benefit information, violate the NLRA, regardless of whether their employees are unionized.

Summary

Employee concerns regarding privacy are increasing, and new rules and regulations are being promulgated to restrict employers in their surveillance of employees and their efforts to protect the employer's confidential information. The rules relating to the non-disclosure of medical documentation and other confidential information are merely the tip of the iceberg with respect to protecting employee privacy. Employers should be careful not to overlook privacy issues in their review of policies.

All employers should consider a "privacy audit" to evaluate their policies and procedures related to employee privacy, as well as those related to protection of employer confidential information. Doing so will assure that employers can successfully protect their own business information, conduct lawful surveillance, searches and investigations and defend necessary employee disciplinary actions. Please call Seaton, Beck, Peters, Bowen & Feuss (952-896-1700) and ask for any available attorney if you would like information about such an audit or have any questions about privacy in the workplace.

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