

Fall 9-1-2023

All Along the New Watchtower: Artificial Intelligence, Workplace Monitoring, Automation, and the National Labor Relations Act

Bradford J. Kelley

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>



Part of the [Labor and Employment Law Commons](#)

Repository Citation

Bradford J. Kelley, *All Along the New Watchtower: Artificial Intelligence, Workplace Monitoring, Automation, and the National Labor Relations Act*, 107 Marq. L. Rev. 195 (2023).

Available at: <https://scholarship.law.marquette.edu/mulr/vol107/iss1/6>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

ALL ALONG THE NEW WATCHTOWER: ARTIFICIAL INTELLIGENCE, WORKPLACE MONITORING, AUTOMATION, AND THE NATIONAL LABOR RELATIONS ACT

BRADFORD J. KELLEY*

Recent technological advances have dramatically expanded employers' ability to electronically monitor and manage employees within the workplace. New technologies, including tools powered by artificial intelligence, are being used in the workplace for a wide range of purposes such as measuring employee work rates, preventing theft, and monitoring drivers with GPS tracking devices. These technologies offer potential solutions for many companies that may increase efficiencies and support operations, dramatically reduce human bias, prevent discrimination and harassment, and improve worker health and safety. Despite these potential benefits, the use of these technologies may raise concerns under the National Labor Relations Act (NLRA), the federal law that protects employees who engage in concerted activities for purposes of mutual aid or protection, if the tools interfere, impair, or negate employees' ability to engage in protected activity.

This Article examines the interaction between new workplace technologies and the NLRA. It begins by exploring the widespread uses of these technologies for monitoring and surveilling employees. Against this backdrop, the Article then discusses how recent activity by the National Labor Relations Board (NLRB), the federal agency that enforces the NLRA, portends significant implications for both unionized and non-unionized workplaces. More specifically, this Article criticizes a recent regulatory framework that was proposed by the NLRB's General Counsel in 2022. Finally, this Article provides other positive suggestions to help ensure compliance with the NLRA.

I. INTRODUCTION	196
II. OVERVIEW OF AI AND WORKPLACE MONITORING.....	202
A. Workplace Technologies: A Brief Overview	202
B. Workplace Technologies and the Employment Lifecycle	202
C. Workplace Discrimination, Harassment, and Violence Uses	206
D. Health and Safety Uses	207
E. Other Uses.....	208

F. Legislative and Regulatory Responses.....	209
III. NLRA: THE LEGAL LANDSCAPE	210
A. NLRA	210
B. The Relevant NLRA Provisions	211
C. The Ping Pong Effect: The NLRB's Shifting Landscape	213
IV. THE NLRB GENERAL COUNSEL'S PROPOSAL	215
A. Increased Enforcement of Existing NLRB Law	216
B. Proposed Legal Framework for Evaluating the Use of Electronic Management Technologies	218
C. Interagency Agreements	220
V. WHY THE NLRB GENERAL COUNSEL'S PROPOSAL IS FLAWED	221
A. Flawed Approach.....	222
B. Discrimination, Harassment, and Occupational Health and Safety Concerns.....	227
C. An Inappropriate Vehicle to Change Law	232
VI. RECOMMENDATIONS: CONSIDERATIONS FOR ALTERNATIVE APPROACHES AND RECOMMENDED PRACTICES	233
A. Alternative Approaches	233
B. Recommended Practices	236
VII. CONCLUSION	239

I. INTRODUCTION

New technologies have revolutionized employers' abilities to monitor and surveil the workplace.¹ These technologies include wearable devices, security cameras, GPS tracking devices and cameras that keep track of the productivity and location of employees, and computer software that takes screenshots, webcam photos, or audio recordings.² Systems using artificial intelligence (AI) are being used to count and identify the words that employees type, the websites

* Bradford J. Kelley is a Shareholder at Littler Mendelson, P.C. in the firm's Washington, DC office. Previously, he served as Chief Counsel to a U.S. Equal Employment Opportunity Commission Commissioner, and also as a Senior Policy Advisor in the U.S. Department of Labor's Wage and Hour Division. For helpful comments and advice on prior drafts, the author thanks Allan King, Andrew Rogers, Tessa Gelbman, Jamie Spataro, Jake Baker, Lance Casimir, and Howard Thorne.

1. See generally Keith E. Sonderling, Bradford J. Kelley & Lance Casimir, *The Promise and the Peril: Artificial Intelligence and Employment Discrimination*, 77 U. MIA. L. REV. 1 (2022).

2. See Danielle Abril, *Your Boss Can Monitor Your Activities Without Special Software*, WASH. POST (Oct. 7, 2022, 7:00 AM), <https://www.washingtonpost.com/technology/2022/10/07/work-app-surveillance/> [https://perma.cc/P64E-LFGX].

they visit, the number of emails they send, and the number of steps or breaks they take.³

Even though many modern technologies are reminiscent of George Orwell's writing, AI and other emerging workplace technologies have legitimate benefits. Monitoring employee communications can help companies detect and mitigate cybersecurity threats and ensure compliance with workplace guidelines.⁴ Surveillance can also help employers prevent their employees from loitering during the workday and ensure employees are not engaged in prohibited conduct, such as pilfering, misappropriating trade secrets, or watching pornography at work.⁵ Furthermore, AI-driven tools can help companies monitor and control attendance while also providing employees with more control over their work, allowing them to be more engaged and productive.⁶ Employers often use AI-driven technologies during the hiring process to analyze a large volume of resumes expeditiously and chatbots handle routine communications with potential candidates.⁷ When appropriately designed and administered, AI and algorithms have also been shown to reduce subjectivity in employment, improve diversity, encourage fairness, and make workplaces safer and more accessible than when handled by employees.⁸ In addition, wearable technologies have been shown to supplement mobility and muscle function, which not only tends to mitigate disabilities, but also reduce workplace injuries and enhance general workplace safety.⁹ Other benefits of AI and monitoring tools include detecting and addressing discrimination and harassment,¹⁰ as well as enhancing occupational health and safety.¹¹ Perhaps

3. Leonie Cater & Melissa Heikkila, *Your Boss is Watching: How AI-Powered Surveillance Rules the Workplace*, POLITICO (May 27, 2021, 11:00 AM), <https://www.politico.eu/article/ai-workplace-surveillance-facial-recognition-software-gdpr-privacy/> [<https://perma.cc/Z47D-HCGR>].

4. *Id.*

5. See 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, 49 (2020).

6. See David Phippen, *The Labor Year in Review, and What to Expect in 2019*, CONSTANGY, BROOKS, SMITH & PROPHETE, LLP (Feb. 13, 2019), <https://www.constangy.com/newsroom-newsletters-852> [<https://perma.cc/32TV-P9QM>].

7. See Sonderling, Kelley & Casimir, *supra* note 1, at 3.

8. See *id.* at 4.

9. See *id.* at 4–5.

10. *Id.* at 4.

11. *Id.* at 58.

not surprisingly, the use of these technologies greatly accelerated during the COVID-19 pandemic with the societal shift to remote work.¹²

Together with the plethora of potential benefits associated with AI and other workplace technologies, employers also face a variety of compliance risks concerning their use and related implications. Significantly, AI and monitoring technologies remain subject to existing laws, notably the National Labor Relations Act (NLRA or Act). Under the NLRA—which was enacted in 1935 long before modern workplace technologies, to say nothing of AI—employees have the right to engage in concerted activities for the purpose of mutual aid or protection, and employers are prohibited from interfering with, restraining, or coercing employees engaged in protected concerted activities.¹³ The protections afforded by the NLRA apply to both unionized and non-unionized workplaces, so the legal challenges carry significant risks for employers who rely upon such technologies to increase efficiencies and support operations.¹⁴ Recent union advances in various industries have been fueled, in part, by employee interest in ways to advance social issues ranging from health and safety at the workplace to racial justice, making NLRA risks an increasingly important concern for employers in recent years.¹⁵

Depending on the ways in which employers manage these issues, they may face NLRA risks stemming from myriad issues associated with newer workplace technologies, especially if the workplace technology is poorly designed or misused. Critics of workplace technologies contend that employers engaging in surveillance, or giving the impression of surveillance, can violate the NLRA if it has a chilling effect on protected activities and makes employees fearful of retaliation.¹⁶ For instance, critics point to GPS tracking devices that can give employers information about the locations and times that workers

12. See Bradford J. Kelley, *Wage Against the Machine: Artificial Intelligence and the Fair Labor Standards Act*, 34 STAN. L. & POL'Y REV. 261, 267 (2023).

13. 29 U.S.C. § 157.

14. See Casey Thibodeaux, *It's What You Said and How You Said It: The NLRB's Attempt to Separate Employee Misconduct from Protected Activity in General Motors LLC*, 82 LA. L. REV. 227, 229 (2021).

15. See Emmy Freedman, *Labor, Employment Issues Top of Mind for GCs, Survey Says*, LAW360 (Jan. 18, 2023, 7:42 PM), <https://www.law360.com/employment-authority/labor/articles/1566828/labor-employment-issues-top-of-mind-for-gcs-survey-says> [<https://perma.cc/TP8B-92TV>] (citing a survey showing that 48% of general counsel respondents said they felt “more exposed” to labor and employment fights last year).

16. Jo Constantz, *They Were Spying On Us': Amazon, Walmart, Use Surveillance Technology to Bust Unions*, NEWSWEEK (Dec. 13, 2021, 6:00 AM), <https://www.newsweek.com/they-were-spying-us-amazon-walmart-use-surveillance-technology-bust-unions-1658603> [<https://perma.cc/9MQU-AVF6>].

gather or keystroke software that could be utilized to identify workers' use of particular words or phrases such as "union."¹⁷ These critics contend that these tools have a greater potential to blunt union organizing efforts because the technology is ubiquitous and workers have no way of knowing when or how their communications are being monitored.¹⁸

As a result of these concerns, as well as the prevalence of remote work during the COVID-19 pandemic which led to a sharp increase in the use of electronic monitoring, the National Labor Relations Board (NLRB or Board), the federal agency responsible for administering and enforcing the NLRA, has shown increased interest in monitoring automated technologies.¹⁹ The NLRB's recent attention in workplace technologies coincides with numerous other federal agencies that have addressed the use of electronic surveillance and algorithmic management technologies.²⁰ In October 2022, Jennifer Abruzzo, current General Counsel of the NLRB, issued a memorandum (GC's Memo) that outlined her prosecutorial initiative aimed at employers that utilize technology to monitor and manage employees in the workplace.²¹ Specifically, General Counsel Abruzzo proposed an amorphous burden-shifting framework of her own creation, whereby an employer will be found to have presumptively violated the NLRA where its "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."²² Equally important, General Counsel Abruzzo's proposal emphasized that other federal agencies are targeting employers for their use of monitoring technologies and the NLRB will use interagency agreements with the other federal agencies to facilitate coordinated enforcement against employers.²³

17. See Tim Ryan, *NLRB GC Proposes Tougher Test For Workplace Monitoring*, LAW360 (Nov. 3, 2022, 8:20 PM), <https://www.law360.com/employment-authority/articles/1546426> [<https://perma.cc/94AJ-G7U7>].

18. Ruben J. Garcia, *Building Worker Collective Action Through Technology*, 65 ST. LOUIS U. L.J. 25, 35 (2020).

19. See Press Release, NLRB, *NLRB General Counsel Issues Memo on Unlawful Electronic Surveillance and Automated Management Practices* (Oct. 31, 2022), <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-issues-memo-on-unlawful-electronic-surveillance-and> [<https://perma.cc/E5NX-NTL7>].

20. See Keith E. Sonderling & Bradford J. Kelley, *Filling the Void: Artificial Intelligence and Private Initiatives*, 24 N.C. J.L. & TECH. 153, 161 (2023).

21. See NLRB Gen. Couns. Mem. GC 23-02, at 1 (Oct. 2022); see also Press Release, NLRB, *supra* note 19.

22. Mem. GC 23-02, *supra* note 21, at 8.

23. *Id.* at 9.

However, General Counsel Abruzzo's proposed framework outlined in the memorandum suffers from several flaws that undermine the approach that she proposes. Because the proposal is vague and leaves critical terms undefined, the GC's Memo strongly suggests that she believes that most electronic monitoring and algorithm-based employer practices violate the NLRA while ignoring employers' legitimate justifications for newer technologies at the workplace.²⁴ On a related front, the GC's Memo proposes a vague standard that prevents employers from being able to accurately predict whether a practice will pass NLRB muster. In addition, because the General Counsel proposes a presumption against the employer's application of AI, the proposed framework emphasizes employees' rights at the expense of employers' interests which directly contravenes the text and purpose of the NLRA.²⁵ In doing so, the GC's Memo overlooks and simultaneously undermines an employer's duty and obligation to maintain a safe workplace, as well as the right to productivity, impose discipline, and ensure safety at their workplaces.

In addition, the General Counsel ignores that many employers use the AI practices at issue to comply with several other laws and regulations, particularly in the areas of anti-discrimination, anti-harassment, and occupational health and safety.²⁶ Federal anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964 and comparable state and local laws, prohibit employers from engaging in unlawful employment practices and other discrimination, including harassment.²⁷ Meanwhile, the Occupational Safety and Health Act (OSH Act)

24. See Steven M. Swirsky, Adam S. Forman, Nathaniel M. Glasser, Neresia A. De Biasi & Ridhi D. Madia, *NLRB General Counsel Seeks to Limit Employers' Use of Artificial Intelligence in the Workplace, Following the Recent Regulatory Trends*, EPSTEIN BECKER & GREEN, P.C. (Nov. 18, 2022), <https://www.workforcebulletin.com/2022/11/18/nlr-general-counsel-seeks-to-limit-employers-use-of-artificial-intelligence-in-the-workplace-following-the-recent-regulatory-trends/> [<https://perma.cc/2ALZ-UWL7>].

25. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 680–81 (1981) (“[T]he [NLRA] is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved.”).

26. See Steven M. Bernstein & Eleanor F. Miller, *NLRB General Counsel Announces Plans to Crack Down on Workplace Monitoring Practices*, FISHER & PHILLIPS LLP (Nov. 7, 2022), <https://www.fisherphillips.com/news-insights/nlr-general-counsel-announces-crack-down-workplace-monitoring-practices.html> [<https://perma.cc/C4Q3-JWLV>] (arguing that many of these practices provide “valuable safety, security, efficiency and (in some cases) compliance benefits that are potentially critical to business success in an increasingly competitive marketplace”).

27. 42 U.S.C. §§ 2000e to 2000e-17. Title VII protects the employees and job applicants against discrimination on the basis of sex, race, color, national origin, and religion. See *id.* In addition to showing intentional discrimination, plaintiffs may also argue that “a respondent uses a particular employment practice that causes a disparate impact on the basis of [a protected characteristic] and the

imposes a general duty on employers to monitor worksites and prevent hazardous conditions from developing.²⁸ At a minimum, the GC's Memo will likely put employers in the precarious position of possibly violating other laws and regulations because of inconsistent federal obligations. As a consequence of the GC's Memo, employers may face an untenable situation where the reasonable use of AI technology inevitably subjects them to liability under the NLRA, anti-discrimination laws, or the OSH Act. Agencies ought not to construe their statutes in ways that cause employers to violate other federal laws. Thus, the proposed framework will not result in more protections for employees, but instead it will only lead to unnecessary litigation and place employers in an impossible no-win situation.

Because of increased NLRA risks, employers using workplace technologies that employ AI should ensure compliance with the NLRA and other laws. At a minimum, employers must remain vigilant to comply with existing law covering unlawful surveillance and monitoring and be fully prepared to explain the business justifications for using their electronic management tools.²⁹ Companies should also be transparent and clearly explain how they use workplace technologies to foster trust, credibility, and a greater appreciation of the merits of the systems and tools.³⁰ Even when using monitoring and surveillance technologies properly, the absence of transparency, accountability, and understandability will likely undermine the benefits of using these technologies. Other aspects for employers to consider include understanding vendor liability and keeping apprised of legal developments.³¹

This Article explores the interaction between workplace technologies such as AI and the NLRA. Part II of this Article provides a brief overview of workplace technologies for the purpose of laying the groundwork for the special employment challenges. To understand the interplay between workplace technologies and the NLRA, Part III provides a background discussion of the NLRA and the NLRB. Part IV then discusses recent regulatory and

respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with its business necessity." *Id.* § 2000e-2(k)(1)(A)(i).

28. 29 U.S.C. § 654(a)(1). The Occupational Safety and Health Administration ("OSHA"), an agency within the U.S. Department of Labor, has primary policy-making and enforcement responsibility for the OSH Act and its implementing regulations over private sector employers.

29. James A. Paretti, Jr., Christopher R. Henderson & Michelle L. Devlin, *NLRB General Counsel Calls for Board to Crack Down on Electronic Surveillance and Automated Management Practices*, LITTLER MENDELSON P.C. (Nov. 3, 2022), <https://www.littler.com/publication-press/publication/nlr-general-counsel-calls-board-crack-down-electronic-surveillance> [<https://perma.cc/3XMG-QNUJ>].

30. See Sonderling, Kelley & Casimir, *supra* note 1, at 11.

31. *Id.* at 12.

enforcement developments at the NLRB involving workplace technologies, notably the GC's Memo outlining a new regulatory framework. Part V argues that the General Counsel's proposal is deeply flawed. Finally, Part VI discusses key considerations for alternative proposals as well as recommended practices that employers should consider for mitigating NLRA risks.

II. OVERVIEW OF AI AND WORKPLACE MONITORING

This Part provides a brief overview of workplace technologies. It also illustrates the architecture and features of these technologies in the workplace and discusses the widespread uses of these tools at all stages of the employment lifecycle, including hiring algorithms, workplace supervision, and determining employee pay.

A. *Workplace Technologies: A Brief Overview*

Many workplace technologies use AI, which can be best understood as computer systems and algorithms “to perform tasks that typically require human-level intelligence to optimize aspects of the workplace, including enhancing productivity, streamlining operations, and improving decision-making.”³² In most situations, employers engage third-party vendors that develop and sell AI-powered algorithms to perform a wide variety of human resources tasks.³³ As a general rule, employers—not vendors—are generally liable for unlawful employment decisions.³⁴ The NLRA is no exception to this rule, as it likewise tends to hold employers liable even where the technologies being sold by vendors might be responsible for the violation.³⁵

B. *Workplace Technologies and the Employment Lifecycle*

Workplace technologies are being used at all stages of the employment lifecycle.³⁶ Research has consistently shown that AI tools properly used for

32. See Kelley, *supra* note 12, at 268.

33. *Id.* at 269.

34. *Id.*; see also Sonderling, Kelley & Casimir, *supra* note 1, at 16 (discussing vendors in the employment discrimination context).

35. See 29 U.S.C. § 152(2) (“The term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.”).

36. See Sonderling, Kelley & Casimir, *supra* note 1, at 3 (detailing the use of AI throughout the employment lifecycle).

employment decision-making may result in greater diversity, unbiased promotion decisions, and better retention of employees.³⁷ Automated employment decision tools include algorithms that analyze social media information to determine which candidates see a job advertisement, tools that analyze the words in resumes, and programs that assess a candidate's personality traits.³⁸

AI-enabled technologies are adding new ways to make a workplace more directly accessible to people with disabilities. Notably, “wearable technologies . . . have been [shown] to mitigate the effects of certain disabilities, thereby broadening employment opportunities for disabled workers while simultaneously preventing work-related accidents and improving productivity by reducing absences due to disability and illness.”³⁹ On a related note, AI is also helping disabled workers with reasonable accommodations in the workplace.⁴⁰

AI programs are increasingly used to identify, monitor, and measure employee performance.⁴¹ Historically, employers could more easily monitor their employees' attendance and performance when they were all in physical locations on a daily basis, but many employers have turned to monitoring software to balance the proliferation of remote work.⁴² Indeed, studies show that around 80% of large employers are using some type of monitoring software at the workplace.⁴³ AI and machine learning are frequently used to track worker on-site and remote activities, including employee log-in times, idle time, overall computer usage, documents accessed, online activities, and are being used to

37. *Id.* at 17.

38. *Id.* at 14–15.

39. *Id.* at 4.

40. *See id.*

41. *See* Ifeoma Ajunwa, *Algorithms at Work: Productivity Monitoring Applications and Wearable Technology as the New Data-Centric Research Agenda for Employment and Labor Law*, 63 ST. LOUIS U. L.J. 21, 45 (2018).

42. *See* Chris Deubert, *Beware Employee Tracking as a Response to 'Quiet Quitting'*, LAW360 (Aug. 29, 2022, 3:20 PM), https://www.law360.com/employment-authority/discrimination/articles/1524770/beware-employee-tracking-as-a-response-to-quiet-quitting-?nl_pk=4db0066a-2003-4805-b5d5-f2e280b5ddb&utm_source=newsletter&utm_medium=email&utm_campaign=employment-authority/discrimination&utm_content=2022-08-30 [https://perma.cc/SZ3N-JK4Z].

43. *See* Alyssa Ward, *Bringing Work Home: Emerging Limits on Monitoring Remote Employees*, JD SUPRA (Nov. 1, 2022), <https://www.jdsupra.com/legalnews/bringing-work-home-emerging-limits-on-8434499/> [https://perma.cc/ENQ3-SWWJ].

measure employee performance.⁴⁴ AI tools can also monitor whether employees are paying attention to their computer screens using webcams and eye tracking software; employers also regularly monitor workers' activities by installing spyware and GPS trackers on desktops and company-issued laptops.⁴⁵ These systems allow for companies to monitor the speed and location of drivers, including truck drivers and ride-sharing drivers working for platform-based systems.⁴⁶ These systems can also be used to verify if such workers gather in particular locations.⁴⁷

Employees failing to achieve set performance standards might face formal disciplinary actions, including potential job termination, as suggested by algorithms.⁴⁸ Numerous employees, whether working from home or in other settings, are subject to tracking tools, scoring systems, so-called idle buttons, in addition to other types of ways to accumulate data.⁴⁹ A pause in activity (whether real or perceived) can lead to penalties, including lost pay and termination.⁵⁰

In a similar way, AI is increasingly being used to measure or enhance worker productivity and efficiency. For instance, some large transportation companies have used wearable technologies including ring scanners to help workers with package sorting, pickup, and delivery.⁵¹ AI is also being used to incentivize worker productivity. For instance, some platform-based services use AI to incentivize driver productivity based on predictive analysis and tailored incentives.⁵² Retail stores use AI to evaluate and incentivize workers based on an automated analysis of their interactions with customers.⁵³

44. See Todd R. Dobry & Taylor M. Napoli, *Can Employers Use Artificial Intelligence and Data Analytics to Track Remote Workers?* JACKSON LEWIS (Mar. 3, 2021), <https://www.dataintelligencereporter.com/2021/03/can-employers-use-artificial-intelligence-and-data-analytics-to-track-remote-workers/> [<https://perma.cc/P624-4C6J>].

45. *Id.*

46. See Valerio De Stefano, "Negotiating the Algorithm": Automation, Artificial Intelligence, and Labor Protection, 41 COMP. LAB. L. & POL'Y J. 15, 24 (2019).

47. *Id.*

48. See Sonderling, Kelley & Casimir, *supra* note 1, at 15.

49. See Jodi Kantor & Arya Sundaram, *The Rise of the Worker Productivity Score*, N.Y. TIMES (Aug. 14, 2022), <https://www.nytimes.com/interactive/2022/08/14/business/worker-productivity-tracking.html> [<https://perma.cc/S4FJ-LMTS>].

50. *Id.*

51. See Ajunwa, *supra* note 41, at 36–37.

52. Pegah Moradi & Karen Levy, *The Future of Work in the Age of AI: Displacement or Risk-Shifting?*, in THE OXFORD HANDBOOK OF ETHICS OF AI 271, 282–83 (Markus D. Dubber, Frank Pasquale & Sunit Das eds., 2020).

53. *Id.*

Monitoring has spread among white-collar jobs and roles that usually require graduate degrees. Doctors, architects, academic administrators, nursing home workers, and others frequently describe that electronic surveillance is increasingly used to monitor their activities and behavior every minute of the day.⁵⁴ For instance, certain radiologists are shown scoreboards that display their periods of inactivity and how their productivity compares to their colleagues.⁵⁵

Software programs can generate timecards and calculate employees' pay. One company offers software to monitor remote workers by taking screenshots of their computers at set intervals and collect data, including keyboard activity and application use, to generate a timecard every ten minutes.⁵⁶ The timecard then creates a logbook for the workers and their managers that show how the worker spent their time. Another business reportedly uses software that generates a photo of employees' faces as well as screenshots of the employees' computer screens every ten minutes throughout the workday.⁵⁷ The company then uses that information to pay the employees and other workers only for the time when the system detected them to be actively working (e.g., moving a mouse or a keystroke) based on the photos. If the photo captures an employee during a brief moment of inactivity (e.g., a short coffee break of around thirty seconds or a quick bathroom break) such periods of perceived inactivity are considered non-compensable idle time so the system would dock an employee's pay for the entire ten-minute duration.⁵⁸

The use of monitoring software to measure work time has already generated litigation. Most notably, in *Kraemer v. Crossover Market, LLC*, a plaintiff brought a putative collective action for unpaid off-the-clock work against her former employer and a company that operates a recruitment platform to hire and manage workers.⁵⁹ The complaint alleged that the defendants required the plaintiff, an independent contractor who worked remotely, to install tracking software, and she was compensated based on the software's tracking of her activities. The plaintiff claimed that the system failed to account for various offline work, including reviewing and annotating hard copy documents, receiving work-related phone calls away from her computer webcam, and participating in Zoom conferences on her mobile phone away from her

54. See Kantor & Sundaram, *supra* note 49.

55. *Id.*

56. See De Stefano, *supra* note 46, at 26.

57. See Kantor & Sundaram, *supra* note 49.

58. *Id.*

59. Original Complaint at 1, *Kraemer v. Crossover Market, LLC*, 1:21-cv-00398-LY (W.D. Tex. May 5, 2021).

workstation.⁶⁰ “[T]he complaint alleged that the ‘spyware software would not give credit for Plaintiff’s work when it did not detect her sitting in front of the computer, keystrokes on her keyboard or movement of her mouse.’”⁶¹ The parties settled for an undisclosed amount.⁶² Practitioners have explained that the lawsuit highlights a practical lesson for managing remote workers: “[T]here can be a problematic disconnect between what surveillance software is capable of measuring and the actual range of tasks an employee regularly performs in the course of carrying out their job duties, particularly where ‘offline’ activities are involved.”⁶³

C. *Workplace Discrimination, Harassment, and Violence Uses*

AI is increasingly being used to combat workplace discrimination and harassment. Immediately after the #MeToo Movement, many companies started to use AI tools to detect and address discrimination and harassment in digital communications.⁶⁴ By using AI to monitor communications and report certain aspects for investigation that the employer deems inappropriate, companies use this technology to prevent the financial and other major costs of toxic workplace behavior. Because of the problem of underreporting of sexual harassment and the fact that many victims do not come forward out of a fear of retaliation, these AI tools, commonly known as “#MeTooBots,” promise “to remove the human element from reporting and rely on AI to detect and report unacceptable conduct before it [potentially] contaminates the workplace.”⁶⁵

Other AI technology may improve how employees report work-related violence and harassment allegations. For instance, AI-powered online tools are available for reporting workplace harassment and discrimination through a chatbot-style platform. A similar tool provides free guidance to victims of sexual harassment and misconduct, using deep learning developments.⁶⁶ AI-

60. See Kelley, *supra* note 12, at 265.

61. Original Complaint at 7, *Kraemer v. Crossover Market, LLC*, 1:21-cv-00398-LY (W.D. Tex. May 5, 2021).

62. See Ward, *supra* note 43.

63. *Id.*

64. See Leora Eisenstadt, *#MeTooBots and the AI Workplace*, 24 U. PA. J. BUS. L. 350, 351 (2022).

65. *Id.*

66. Erin Winick, *Victims of Sexual Harassment Have a New Resource: AI*, MIT TECH. REV. (Dec. 6, 2017), <https://www.technologyreview.com/2017/12/06/241607/victims-of-sexual-harassment-have-a-new-resource-ai/> [<https://perma.cc/A8HK-PJUS>] (noting that this AI system has been trained on more than 300,000 U.S. and Canadian criminal court documents, including over 57,000 documents and complaints related to sexual harassment many of those in the workplace or that entail a work-related aspect).

based programs are commonly used to “analyze the content of e-mails to warn users away from sending potentially harassing messages,” while other programs have “predefined patterns of sexually harassing behavior to flag potential harassment.”⁶⁷

D. Health and Safety Uses

Workplace technologies that utilize AI and machine learning are being widely used to create a safe environment for workers in many industries, including manufacturing, construction, oil and gas, food processing, and forestry.⁶⁸ AI-driven access control systems using computer vision and image analysis algorithms can be installed to check the identification of workers entering worksites to prevent unauthorized access and to scan worker safety attire to ensure personal protective equipment (PPE) compliance.⁶⁹ The use of AI-powered monitoring technology means that safety professionals do not have to rely solely on observations, walkarounds, or inspections to ensure workers are wearing PPE or to identify other safety issues at worksites. Once violations are detected, they are immediately reported to safety managers, allowing them to take proactive remedial measures. AI is increasingly used in the agricultural industry, including AI-assisted farm machinery equipment, autonomous pesticide sprayers, and equipment that can determine whether specific plants are valuable crops or weeds.⁷⁰ AI-powered agricultural equipment also improves safety by reducing how many workers are needed for labor-intensive tasks during hot weather and removing operators from hazardous tasks such as moving a pesticide sprayer.⁷¹

AI-powered predictive maintenance systems are used “to determine the condition of equipment and predict when maintenance should be performed,” thereby preventing “failures that may lead to worker injuries ahead of time.”⁷²

67. James de Haan, *Preventing #MeToo: Artificial Intelligence, the Law, and Prophylactics*, 38 LAW & INEQ. 69, 85 (2020).

68. Yevheniia Minaieva, *How Can Technology Improve Workplace Safety?*, MEDIUM (Apr. 28, 2020), <https://medium.com/applied-machine-learning-for-manufacturing/how-can-technology-improve-workplace-safety-be37bf9209b4> [<https://perma.cc/3U6U-UVS7>].

69. *Id.*

70. See Bruce Rolfsen, *AI-Based Farm Equipment May Increase Worker Safety but Cost Jobs*, BLOOMBERG LAW (June 27, 2023, 4:30 AM), <https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/> [<https://perma.cc/QX7U-JQEX>].

71. *Id.*

72. See Minaieva, *supra* note 68 (explaining that when a piece of equipment needs maintenance, it is automatically shut off and access to it gets blocked by AI and that studies show that this technology results in a fourteen percent reduction in safety, health, environment, and quality risks).

AI is increasingly being used to track interactions between workers and heavy machinery, reducing or preventing entirely accidental injuries for machine operators and bystanders, “checking if workers are in or outside of designated areas, and performing ergonomic assessments.”⁷³ “The devices also can be paired with sensors or wearable technologies that attach to hard hats, vests, and other items.”⁷⁴ Cameras, sensors, and wearable technologies can also generate heat maps that show where high-risk activities occur in a facility.⁷⁵ Certain AI-enabled programs can help assess fatigue, which can dramatically help employees, especially those working long hours.⁷⁶

Wearable technologies have also been widely used in the construction industry for safety monitoring.⁷⁷ Because of the high frequency of work-related injuries and fatalities in the construction industry, as well as the transient and dynamic nature of the industry, companies regularly turn to AI to promote safety. In addition, active monitoring of workers’ physiological data with wearable technology may allow for measurement of heart rate, breathing rate, and posture.⁷⁸

E. Other Uses

Many companies are using workplace technologies “to prevent and detect everything from routine employee theft to insider trading.”⁷⁹ Similarly, AI is being used to address insider threats “without consistently capturing a worker on camera or other abuses of access.”⁸⁰ Email applications can be configured to highlight emails containing sensitive details, like a company’s credit card number or an employee’s social security number. This approach does not

73. See Alan Ferguson, *Artificial Intelligence and on-the-job Safety*, SAFETY & HEALTH MAG. (Dec. 19, 2021), <https://www.safetyandhealthmagazine.com/articles/22026-artificial-intelligence-worker-safety> [<https://perma.cc/2H3M-3LZD>].

74. *Id.*

75. *Id.*

76. *Id.*

77. See generally Kabir Ibrahim, Eric Marks & Matthew Hallowell, *Benefits and Challenges of Wearable Safety Devices in the Construction Sector*, SMART & SUSTAINABLE BUILT ENV'T (Emerald Publ'g Ltd. Mar. 22, 2023), <https://doi.org/10.1108/SASBE-12-2022-0266> [<https://perma.cc/9632-GU9D>].

78. See Ajunwa, *supra* note 41, at 36–37.

79. Lisa Quest, Anthony Charrie, Lucas du Croo de Jongh & Subas Roy, *The Risks and Benefits of Using AI to Detect Crime*, HARV. BUS. REV. (Aug. 9, 2018), <https://hbr.org/2018/08/the-risks-and-benefits-of-using-ai-to-detect-crime> [<https://perma.cc/2S5U-6SAX>].

80. Lindsey Wilkinson, *Tech Surveillance Can Stave Off Insider Threats, But Employers Need Guardrails*, CIO DIVE (Nov. 29, 2022), <https://www.ciodive.com/news/electronic-surveillance-NLRB-automated-management-practices/637553/> [<https://perma.cc/3UW4-LXRQ>].

monitor every word, but instead provides the security team a chance to verify legitimate scenarios, such as an employee completing a work form or addressing tax matters.

F. Legislative and Regulatory Responses

The recent attention by the NLRB General Counsel is yet another indication that federal agencies are intensifying their scrutiny on workplace monitoring tools and surveillance.⁸¹ Indeed, other federal agencies have addressed the use of electronic surveillance and algorithmic management technologies. Federal agencies such as the Federal Trade Commission (FTC), Consumer Financial Protection Bureau (CFPB), Department of Justice (DOJ), Equal Employment Opportunity Commission (EEOC), and Department of Labor (DOL) are working to address a range of concerns relating to the use of such technologies in various areas of life.⁸² Some employment-related concerns range from discrimination in hiring and work assignments, the classification of workers as independent contractors, unfair or deceptive pay practices, and selling or sharing workers' personal data.⁸³

Federal, state, and local labor and employment rules and guidance have begun to address the accelerated employer deployment of AI and other emerging technologies. Several federal legislative proposals are being considered. For instance, the Stop Spying Bosses Act was introduced in 2023 which "would require any employers using monitoring tools to disclose the practice to those under scrutiny" and "mandate that employers specify what data is being collected and how the surveillance affects any employment-related decisions, like performance assessments."⁸⁴ There has been a lot of activity at

81. See Ryan Golden, *Surveillance, AI Tech May Violate Labor Laws, NLRB General Counsel Says*, HR DIVE (Nov. 1, 2022), <https://www.hrdiver.com/news/nlrb-general-counsel-abruzzo-memo-surveillance-ai-algorithms-violate-labor-laws/635509/> [<https://perma.cc/XTF2-63N9>].

82. See Sonderling, Kelley & Casimir, *supra* note 1, at 43.

83. See *id.*; see also FTC, FTC POLICY STATEMENT ON ENFORCEMENT RELATED TO GIG WORK 15 (Sep. 15, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Matter%20No.%20P227600%20Gig%20Policy%20Statement.pdf [<https://perma.cc/KJ83-5ZEN>] (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 in poorer working conditions for gig workers).

84. See Anne Cullen, *As Workplace Surveillance Rises, Lawmakers Are Taking Note*, LAW360 (Feb. 15, 2023, 8:23 PM), https://www.law360.com/employment-authority/discrimination/articles/1576655?nl_pk=4db0066a-2003-4805-b5d5-f2e280b5ddbe&utm_source=newsletter&utm_medium=email&utm_campaign=employment-authority/discrimination&utm_content=2023-02-16&nlsidx=0&nlaidx=0 [<https://perma.cc/QV9V-XL4J>].

the state level as well. For example, Illinois and Maryland have enacted laws regulating the use of AI in job interviews, while California and New York have promulgated or announced regulations that address these technologies and their potential workplace impacts.⁸⁵

III. NLRA: THE LEGAL LANDSCAPE

Before examining the specific legal risks at issue with AI and workplace monitoring, it is important to establish a baseline understanding of the NLRA. This Part summarizes critical aspects of NLRA law touching on workplace technologies.

A. NLRA

In 1935, Congress enacted the NLRA to protect employees' rights to organize and bargain collectively. The NLRA was designed to promote the public's interest by eliminating public strife and unrest historically associated with labor disputes by balancing the burdens and benefits among private employers, unions, and employees.⁸⁶ The Board must "strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy."⁸⁷ The NLRA created the NLRB as an independent enforcement agency. The NLRB consists of five members, appointed by the president and confirmed by the Senate, for five-year staggered terms with no more than three members at any time belonging to the same political party to ensure that the Board is not completely subject to political influence.⁸⁸ The NLRA grants the General Counsel authority to issue unfair labor practice complaints, conduct hearings, subpoena witnesses, make findings, and order remedial actions.⁸⁹ The Board operates through regional offices managed by regional directors who receive election petitions, direct and

85. See Sonderling & Kelley, *supra* note 20, at 162.

86. See 29 U.S.C. § 151.

87. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33–34 (1967); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797–98 (1945) (referring to "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments"); NLRB v. Erie Resistor Corp., 373 U.S. 221, 229 (1963) (referring to the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer's conduct").

88. See 29 U.S.C. § 153(a); see also Thibodeaux, *supra* note 14, at 235.

89. 29 U.S.C. § 153(d).

conduct union elections, and investigate and make cause determinations when unfair labor practice charges are filed.⁹⁰

As a general rule, the NLRB has the choice between creating policies through rulemaking or through adjudication.⁹¹ Historically, the Board has predominantly relied on case-by-case adjudication instead of notice-and-comment rulemaking.⁹² On one hand, case-by-case adjudication has resulted in sharp inconsistencies in outcomes, as the Board regularly overturns previous precedents.⁹³ These changes to precedent are often attributable to changes in the party of the current presidential administration and, consequently, the composition of NLRB membership. On the other hand, case-by-case adjudication allows the Board to engage in greater exploration of factual disputes and to make incremental policy changes.

In addition to the NLRB members, the General Counsel of the NLRB plays an important role in the enforcement of the NLRA.⁹⁴ The General Counsel is independent from the Board, is appointed by the president to a four-year term, and is chiefly responsible for investigating and prosecuting unfair labor practices.⁹⁵ Significantly, the NLRB's General Counsel issues enforcement guidance by memoranda, which provide broad notice of the General Counsel's stances on particular areas of enforcement.⁹⁶ Even though these memoranda do not represent the official legal position of the entire agency and do not carry the force of law, they do serve as an important bellwether for the NLRB's current enforcement posture, especially for the regional offices investigating and prosecuting charges against employers.⁹⁷

B. *The Relevant NLRA Provisions*

Section 7 of the NLRA provides, in relevant part, employees with the right to engage in concerted activities for mutual aid or protection, regardless of whether the workplace is unionized.⁹⁸ Generally, activity is concerted when an employee acts with one or more other employees or on behalf of a group of

90. 29 U.S.C. §§ 153(a)–(b), 159(c)(3), 160(a), 160(l); 29 C.F.R. §§ 101.23(a)–(b), 102.62(a)–(c) (2021).

91. Thibodeaux, *supra* note 14, at 238.

92. *Id.*

93. *Id.*

94. *See* 29 U.S.C. § 153(d).

95. *Id.*

96. *See* Zev J. Eigen & Sandro Garofalo, *Less Is More: A Case for Structural Reform of the National Labor Relations Board*, 98 MINN. L. REV. 1879, 1911 (2014).

97. *See* Bernstein & Miller, *supra* note 26.

98. 29 U.S.C. § 157.

employees; it does not include activity by a single employee for that individual's personal benefit.⁹⁹ Even if the activity is deemed concerted, to receive protection under the NLRA it must also be for "mutual aid or protection," in the pursuit of improving terms or conditions of employment.¹⁰⁰

The NLRA has a wide variety of limitations. Public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors are excluded from the NLRA's coverage.¹⁰¹ Certain activities and speech are unprotected under the Act. For instance, individual remarks by employees may lose protection if they are not made on behalf of other employees or if they are not intended to improve the working conditions of a group of employees.¹⁰² Courts and the NLRB have held that concerted activity can lose its protected status under Section 7 when the activity is violent, malicious, disloyal, publicly disparaging, disruptive, intentionally untruthful, or illegal.¹⁰³

Section 8(a)(1) of the NLRA prohibits employers from engaging in practices that "interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights.¹⁰⁴ Thus, if an employer interferes with or otherwise restrains an employee in the exercise of those rights, it has committed an unfair labor practice under the NLRA. A scholar has explained that "[n]either [the] core right nor the unfair labor practices enumerated in Section 8 of the NLRA addresses employees' privacy or employer surveillance explicitly."¹⁰⁵

99. *Id.*

100. *See id.*

101. 29 U.S.C. § 152(3) (stating public sector employees includes employees of state, federal, and local governments and their sub-divisions). According to section 152(11) of the NLRA, "supervisor" means "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 152(11).

102. Stephanie M. Merabet, Note, *The Sword and Shield of Social Networking: Harming Employers' Goodwill Through Concerted Facebook Activity*, 46 SUFFOLK U. L. REV. 1161, 1170–71 (2013).

103. Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1707–08 nn.158–60 (1989) (citing cases); *see also* Merabet, *supra* note 102, at 1171.

104. 29 U.S.C. § 158(a)(1).

105. Charlotte Garden, *Labor Organizing in the Age of Surveillance*, 63 ST. LOUIS U. L.J. 55, 60 (2018).

The evaluation of workplace policies or practices under the NLRA is not done in a vacuum, but necessarily requires balancing Section 7 rights with “the equally undisputed right of employers to maintain discipline in their establishments.”¹⁰⁶ Similarly, Section 7 rights must be balanced with compliance with federal laws and regulations.¹⁰⁷ Courts have regularly emphasized that the NLRB cannot ignore when the NLRA conflicts with other federal statutes and rules.¹⁰⁸

C. *The Ping Pong Effect: The NLRB’s Shifting Landscape*

In recent decades, the NLRB has been described as an inherently partisan institution that tends to rule in favor of management during Republican administrations and in favor of labor unions and employees during Democratic administrations, which has resulted in inconsistent decision-making.¹⁰⁹ Indeed, certain NLRB perspectives usually shift based on which party controls the White House, including employee handbook rules, joint employer status, independent contractor classifications, the validity of confidentiality provisions in separation agreements, and even what constitutes protected concerted activity.¹¹⁰ The prevalent partisanship at the Board has also resulted in frequent flip-flops over some of the most important legal issues, including the determination of what constitutes a bargaining unit and who should be considered an “employee” or a “supervisor” under the NLRA.¹¹¹

During the Trump administration, the NLRB issued several decisions that recalibrated the previous administration’s Section 7 expansions.¹¹² At the same time, the COVID-19 pandemic brought dramatic changes to workplaces across the country and created an environment ripe for protected, concerted activities.

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

107. See, e.g., Can-Am Plumbing, Inc. v. NLRB, 321 F.3d 145, 153–54 (D.C. Cir. 2003).

108. See *id.* (explaining that “where the policies of the Act conflict with another federal statute, the Board cannot ignore the other statute”).

109. Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board’s Unfair Labor Practice Decisions Through the Clinton and Bush II Years*, 37 BERKELEY J. EMP. & LAB. L. 223, 230 (2016); see also Thibodeaux, *supra* note 14, at 235–36.

110. Samantha J. Walter, *Flip Flops Should Be Limited to Footwear: An Analysis of the NLRB’s Ever-Changing Interpretations of Concerted Activity Under the NLRA*, 127 PENN ST. L. REV. 539, 542, 545–46 (2023).

111. Semet, *supra* note 109, at 230; Walter, *supra* note 110, at 545.

112. Jonathan J. Spitz & Richard F. Vitarelli, *Labor Board General Counsel Announces ‘Vigorous Enforcement’ of Protected Concerted Activity Charges*, JACKSON LEWIS (Apr. 06, 2021), <https://www.jacksonlewis.com/insights/labor-board-general-counsel-announces-vigorous-enforcement-protected-concerted-activity-charges> [<https://perma.cc/6QEY-XCZJ>].

During this time, the Board saw a significant increase in the number of unfair labor charges relating to COVID-19 in the workplace such as allegations of inadequate PPE, failure to follow quarantine guidelines, and a host of other issues unique to the pandemic.¹¹³

On January 20, 2021, the day he took office, President Biden requested the resignation of NLRB General Counsel Peter Robb.¹¹⁴ When Mr. Robb refused, the White House fired him.¹¹⁵ The next day, the President requested the resignation of Acting General Counsel Alice Stock, who was elevated from her previous position as Deputy General Counsel after Mr. Robb was fired. Because she also refused to resign, she was fired, continuing a sequence reminiscent of the Saturday Night Massacre.¹¹⁶ While it is common for an incoming administration to make certain changes, no president had fired the incumbent NLRB general counsel prior to the end of their Senate-confirmed four-year term.¹¹⁷ Shortly after Mr. Robb was fired, the President nominated Jennifer Abruzzo, a former Board attorney who had spent the majority of her career at the NLRB and had most recently served as General Counsel for a large union. In July 2021, Abruzzo was confirmed by the Senate with a 51–50 vote, with Vice President Kamala Harris delivering the decisive tie-breaking vote.¹¹⁸

Even though it was expected that the NLRB would move in a pro-labor direction in the Biden administration, the impact was much more pronounced and wide-ranging than anticipated. After her appointment and confirmation, General Counsel Abruzzo immediately sought not only to reinstate Obama-era Board decisions, but also imposed labor law changes via fiats designed to bypass congressional action.¹¹⁹ In August 2021, General Counsel Abruzzo

113. *Id.*

114. Gary Simpler & Chad Horton, *Under the Biden Administration, Turbulence Awaits Employers at the NLRB*, SHAWE ROSENTHAL LLP (Jan. 29, 2021), <https://shawe.com/articles/under-the-biden-administration-turbulence-awaits-employers-at-the-nlrb/> [<https://perma.cc/9GAR-LR6S>].

115. *Id.*

116. *Id.*

117. *Id.* (noting that the only other time the NLRB's General Counsel was relieved of his position by an incoming President occurred in 1950 when President Harry Truman requested and received the resignation of NLRB General Counsel Robert Denham).

118. Steven M. Swirsky & Christopher Shur, *Senate Confirms Biden Nominee Jennifer Abruzzo as NLRB General Counsel, Paving Way for Pro-Union Shift*, EPSTEIN BECKER & GREENE, P.C. (July 26, 2021), <https://www.managementmemo.com/2021/07/26/senate-confirms-biden-nominee-jennifer-abruzzo-as-nlr-general-counsel-paving-way-for-pro-union-shift/> [<https://perma.cc/HX28-2HRX>].

119. See Todd Dawson, *Caution Signs Ahead: New NLRB General Counsel Memo Offers a Surprising (and Alarming) Road Map of Plans and Priorities*, BAKER & HOSTETLER LLP (Aug. 23, 2021), <https://www.employmentlawspotlight.com/2021/08/caution-signs-ahead-new-nlr-general-counsel-memo-offers-a-surprising-and-alarming-road-map-of-plans-and-priorities/> [<https://perma.cc/LHW9-GUFS>].

issued a memorandum outlining more than sixty areas where she potentially was looking to overturn NLRB precedent or change the direction of Board law.¹²⁰

IV. THE NLRB GENERAL COUNSEL'S PROPOSAL

The increasing availability and use of electronic management technology, often powered by AI, has drawn increased scrutiny from regulators, including the NLRB. The first sign that the NLRB was interested in AI and related technologies came in 2022 when the NLRB and the FTC entered into a memorandum of understanding regarding information sharing, cross-agency training, and outreach in areas of common regulatory interest, focusing on the “gig economy.”¹²¹ One area of interest identified by the memorandum raises novel enforcement issues as applied to independent contractors: “the impact of algorithmic decision-making on workers.”¹²² The agreement suggests that gig economy companies investigated by either agency should expect that information submitted to one agency may be scrutinized by both.

Another sign of the growing interest in the impact of worker surveillance and AI on union activity also occurred in 2022 when the White House's Office of Science and Technology Policy issued its “Blueprint for an AI Bill of Rights,” which addressed contexts in which automation could lead to bias and discrimination, including at the workplace.¹²³ For example, the blueprint cites instances where employers had reportedly used “surveillance software to track employee discussions about union activity and use the resulting data to surveil individual employees and surreptitiously intervene in discussions.”¹²⁴

In October 2022, three weeks after the White House issued its “Blueprint for an AI Bill of Rights,” General Counsel Abruzzo issued Memorandum GC 23-02, which detailed her plans to “vigorously enforc[e]” existing law and urged the Board to apply existing principles in new ways, particularly against

120. Daniel Johns, *NLRB GC Memos Complicate Labor Law Compliance*, LAW360 (May 10, 2023, 5:35 PM), <https://www.law360.com/employment-authority/labor/articles/1606392/nlr-gc-memos-complicate-labor-law-compliance> [<https://perma.cc/QR6R-VUQ3>].

121. See Memorandum of Understanding Between The Federal Trade Commission (FTC) and the National Labor Relations Board (NLRB) Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest 1 (July 19, 2022), <https://www.nlr.gov/sites/default/files/attachments/pages/node-7857/ftcnlr-mou-71922.pdf> [<https://perma.cc/9TT2-JZ5T>].

122. See *id.*

123. BLUEPRINT FOR AN AI BILL OF RIGHTS: MAKING AUTOMATED SYSTEMS WORK FOR THE AMERICAN PEOPLE, WHITE HOUSE OFF. SCI. TECH. POL'Y 3 (2022), <https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf> [<https://perma.cc/7KG3-UJZH>].

124. *Id.* at 32.

employers who use AI to assist with monitoring or decision-making regarding hiring, discipline, or performance management.¹²⁵ The General Counsel expressed concern that some employers' use of "intrusive or abusive electronic monitoring and automated management practices" could reasonably be expected to interfere with employees' right to engage in activities protected under Section 7 of the NLRA.¹²⁶

In the GC's Memo, General Counsel Abruzzo implicitly directed NLRB regional offices to scrutinize a broad range of "automated management" and "algorithmic management" technologies, described as "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."¹²⁷ Workplace technologies subject to this scrutiny include a wide range of tools used during working time, including wearable devices, security cameras, GPS tracking devices and cameras, and computer software that takes screenshots, webcam photos, or audio recordings during the work day.¹²⁸ The GC's Memo also states that the agency will not limit its scrutiny to technologies that employers may use during the work day but will also focus on technologies used when employees are off-duty, including employer-issued phones and wearable devices, and applications installed on employees' personal devices.¹²⁹ Finally, the General Counsel noted that employers use such technologies to hire employees, including online cognitive assessments and social media reviews that may "pry into job applicants' private lives."¹³⁰ The GC's Memo suggests that technologies such as resume readers and other automated tools used during hiring and promotion may also be subject to increased scrutiny.

A. Increased Enforcement of Existing NLRB Law

The first part of the GC's Memo urges rigorous enforcement of existing NLRB precedent to analyze whether certain types of surveillance and technologies used by employers allegedly violate the NLRA.¹³¹ To do so, the General Counsel relies on cases that have identified certain employer practices that already constitute unlawful surveillance. For example, the GC's Memo

125. Mem. GC 23-02, *supra* note 22, at 1.

126. *Id.*

127. *Id.*

128. *Id.* at 2.

129. *Id.*

130. *Id.*

131. *Id.* at 3.

explains that under current Board precedent an employer may violate Section 8(a)(1) of the Act by instituting new monitoring technologies in response to protected activities or by using existing technology to discover Section 7 activity, such as reviewing security camera footage or employees' social media accounts.¹³² The GC's Memo warns that such activities would be equally unlawful if the employer "merely creates an impression of surveillance."¹³³

In addition, the GC's Memo states that employers violate Section 8(a)(1) of the NLRA "if they discipline employees who concertedly protest workplace surveillance or the pace of work set by algorithmic management."¹³⁴ One example is a company that "terminates several employees who protest the employer's introduction of a new system that takes screenshots of workers' laptop screens" at certain points during the workday.¹³⁵ The GC's Memo claims that such an employer may violate Section 8(a)(1) if it coercively questions employees by using personality tests to determine whether they may seek union representation.¹³⁶ Further, the GC's Memo somewhat paradoxically states that an employer may violate the NLRA if it dismantles the technology to preclude employees from engaging in protected activity, or otherwise isolates union supporters or dissatisfied employees to prevent protected activity.¹³⁷

Moreover, the GC's Memo takes the position that employers may violate Section 8(a)(3) by using AI to screen job applicants or discipline employees if the underlying algorithm makes determinations based on employees' protected activities.¹³⁸ For instance, if an algorithm screens out or gives a lower score for applicants whose resumes or applications indicate prior union membership or interest in workers' rights, bypassing or rejecting these applicants on the basis of these factors would likely violate the NLRA.¹³⁹ In addition, employers may also violate Section 8(a)(3) by using workplace technologies to remove union supporters by "discriminatorily applying production quotas or efficiency

132. *Id.*

133. *Id.* at 4.

134. *Id.*

135. See Matt Scherer, *NLRB Memo Takes Aim at Intrusive Workplace Surveillance & Algorithmic Management Systems*, CTR. FOR DEMOCRACY & TECH.: PRIV. & DATA (Dec. 21, 2022), <https://cdt.org/insights/nlr-b-memo-takes-aim-at-intrusive-workplace-surveillance-algorithmic-management-systems/> [<https://perma.cc/4KKH-PYPV>].

136. See Chad Horton, *NLRB General Counsel Targets Employers' Use of Electronic Monitoring and Algorithmic Management Technologies*, SHAW ROSENTHAL LLP (Nov. 30, 2022), <https://shawe.com/articles/nlr-b-general-counsel-targets-employers-use-of-electronic-monitoring-and-algorithmic-management-technologies/> [<https://perma.cc/R87E-DX68>].

137. Mem. GC 23-02, *supra* note 22, at 5.

138. *Id.*

139. See Horton, *supra* note 136.

standards.”¹⁴⁰ Notably, the GC’s Memo states that a third-party vendor “of the algorithmic tool may also be liable on the theory that the third party is acting as the employer’s agent in making the alleged unlawful decision.”¹⁴¹

Finally, the GC’s Memo states that employers also violate Section 8(a)(5) of the NLRA if they fail to bargain with the union that serves as the employees’ bargaining representative over the implementation of tracking technologies or fail to provide the union with information about their use of technology or the use of the data they gather.¹⁴²

B. Proposed Legal Framework for Evaluating the Use of Electronic Management Technologies

In addition to enforcing existing law, the next part of the GC’s Memo urges the NLRB to adopt a new legal framework for evaluating the use of electronic management technologies to allegedly protect employees’ Section 7 rights.¹⁴³ While acknowledging that “the Board must reach an accommodation between competing employer interests and employee rights,” practitioners explain the proposed framework makes little effort to do so.¹⁴⁴ Instead, the GC’s Memo urges the NLRB to vindicate the latter at the expense of the former and find “that employers presumptively violate[] section 8(a)(1) where [its] surveillance and management practice[], viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in [protected] activity.”¹⁴⁵ In other words, the framework requires employers to “bear the burden of justifying their use of seemingly routine management technology.”¹⁴⁶ Because the General Counsel fails to provide any examples of surveillance and management practices that the NLRB should presume are unlawful, in practice, the presumption extends to *any* form of electronic monitoring regardless of whether the practice is covert, occurs at the employer’s property, or is used when the employee is on duty.

If an employer somehow overcomes the broad presumption, it bears an additional burden of establishing that its lawful practices are also “narrowly

140. See Mem. GC 23-02, *supra* note 22, at 5.

141. See Horton, *supra* note 136.

142. See Mem. GC 23-02, *supra* note 22, at 5.

143. *Id.* at 5–6.

144. *Id.* at 8.

145. *Id.*

146. Darrah N. Hinton, Naazaneen Hodjat & Matt Jedreski, *NLRB General Counsel Pushes for “Vigorous Enforcement” of Employers’ Use of Technology*, DAVIS WRIGHT TREMAINE LLP (Nov. 8, 2022), <https://www.dwt.com/blogs/employment-labor-and-benefits/2022/11/nlr-employee-surveillance-technology-rights> [<https://perma.cc/M35V-FT2Z>].

tailored to address a legitimate business need.”¹⁴⁷ More specifically, the proposed framework would require the employer to not only establish a legitimate business justification, but also show that the stated objective could not be accomplished by other means “less damaging to employee rights.”¹⁴⁸ Put differently, even if the employer establishes that its monitoring or management practices are supported by a business need, an employer will not meet the General Counsel’s proposed burden if the Board deems there is any alternative means to accomplish the same goal in a less restrictive manner.

However, even if the employer demonstrates that there is no less restrictive way to satisfy its legitimate business needs, the inquiry continues.¹⁴⁹ The proposed framework will then require the NLRB to balance the employer’s interests against those of the employee to determine if the monitoring or management practices are lawful. As such, the NLRB could still find that an employer’s practices violate the NLRA even if the practices are completely supported by a legitimate business need with no less-restrictive alternative because the Board finds that employees’ interests outweigh employers’ interests on balance.¹⁵⁰

Finally, the GC’s Memo states that “[i]f the employer’s business need outweighs employees’ Section 7 rights” and justifies the use of these technologies, the General Counsel’s proposed framework would “require . . . employer[s] to disclose to employees [any] technologies it uses to monitor and manage them, its reasons for doing so, and how it is using the information it obtains.”¹⁵¹ Without that information, the General Counsel contends, employees cannot “intelligently exercise their Section 7 rights.”¹⁵² An employer will be excused from such disclosures only if the employer can demonstrate undefined “special circumstances” justifying the covert use of the tools.¹⁵³ Practitioners have explained that “[s]uch affirmative disclosure requirements—in the absence of ongoing organizing activity and despite a balancing of interests in favor of the employer—would be virtually unprecedented in the annals of workplace law.”¹⁵⁴ In a footnote, the General Counsel also notes that she may seek other “safeguards or assurances,” such as limiting access to information and permitting employees to respond to

147. See Mem. GC 23-02, *supra* note 22, at 8.

148. *Id.*

149. See Horton, *supra* note 136.

150. *Id.*

151. See Mem. GC 23-02, *supra* note 22, at 8.

152. *Id.*

153. *Id.*

154. Bernstein & Miller, *supra* note 26.

discipline based on electronically obtained information.¹⁵⁵ Moreover, in a footnote, the General Counsel instructs NLRB regional offices to require employers to report expenditures on electronic management technology to the DOL's Office of Labor-Management Standards under Form LM-10 as part of any settlement of such charges.¹⁵⁶

C. Interagency Agreements

Lastly, the final part of the GC's Memo reaffirms the interagency approach between the NLRA and other federal agencies—including the FTC, DOJ, EEOC, and DOL—to facilitate information sharing and coordinated enforcement against employers to address new cases involving technology in the workplace.¹⁵⁷ In practical terms, this suggests that employers being investigated by the agencies mentioned should expect that any information submitted to one agency may be scrutinized by any other agency with an operative agreement with the NLRB. Put differently, employers may find themselves under investigation from multiple agencies stemming from a single charge with one agency.

The emphasis on interagency agreements contained in the GC's Memo reflects the Biden administration's "whole of government" approach to aggressively promote a pro-union agenda across the entire spectrum of the government. The Biden administration's "whole of government" approach has relied on executive orders, interagency task forces, councils, interagency agreements, individual agency actions such as rulemaking and enforcement strategies, attempts to influence Congress, and a host of other ways to achieve

155. Mem. GC 23-02, *supra* note 22, at 8 n.40.

156. *Id.* at 4 n.16.

157. See Mem. GC 23-02, *supra* note 22, at 9; see also Memorandum of Understanding Between the U.S. Department of Justice and the National Labor Relations Board 2 (July 26, 2022), <https://www.nlr.gov/sites/default/files/attachments/pages/node-7857/dojantitrust-nlr-mou-72622.pdf> [<https://perma.cc/JTQ4-K8CE>]; Memorandum of Understanding Between the Department of Labor and the National Labor Relations Board Relating to the Investigation and Prosecution of Crimes and Civil Enforcement Actions Under the Labor-Management Reporting and Disclosure Act of 1959 and the National Labor Relations Act 2 (Dec. 29, 2020), https://www.nlr.gov/sites/default/files/attachments/pages/node-7857/3-olmsnlrb_mou_12292020.pdf [<https://perma.cc/5CVT-Q6YV>]; Memorandum of Understanding Between the General Counsel of the National Labor Relations Board and the Equal Employment Opportunity Commission 2 (Nov. 16, 1993), https://www.nlr.gov/sites/default/files/attachments/pages/node-7857/9-eeocnlrb_mou_111693.pdf [<https://perma.cc/382E-NU4B>]; Memorandum of Understanding Between the FTC and the NLRB, *supra* note 121, at 1.

a pro-union agenda.¹⁵⁸ The fact that the GC’s Memo was released just a few weeks after the White House issued its “Blueprint for an AI Bill of Rights,” which briefly mentioned the possibility of employers using workplace technologies for anti-union purposes, strongly suggests that the GC’s Memo was part of a coordinated governmental campaign to create favorable conditions for unions. General Counsel Abruzzo has acknowledged the importance of the “whole of government” approach and the pivotal role that interagency agreements play to advance union interests. Notably, in an announcement about an interagency agreement between the NLRB and the CFPB in March 2023, General Counsel Abruzzo explained that the NLRB was “excited to work with CFPB to strengthen our whole-of-government approach.”¹⁵⁹ The “whole of government” approach to promoting unions is completely inconsistent with the intent and structure of the NLRA. Federal courts have regularly emphasized that “it is not the purpose of the statute to pressure employees into undertaking organizational efforts. Embodied in the statute is a principle of free choice.”¹⁶⁰

V. WHY THE NLRB GENERAL COUNSEL’S PROPOSAL IS FLAWED

Even though the plaintiffs’ bar, union-side attorneys, and some civil rights groups praised the GC’s Memo as an effective way to highlight the issue and an important step toward updating NLRB law with those changes, closer analysis reveals that it is poorly designed and raises more questions than it answers.¹⁶¹ The fact that it is an ill-conceived proposal is strongly evidenced by the fact that the entire scheme was based on three brief sentences contained in a short symposium journal article from 2018.¹⁶² The symposium journal article provides no details on how the proposal would work in practice, and the

158. *Unprecedented ‘Whole of Government’ Support of Unions is Harmful*, U.S. CHAMBER COM. (Oct. 24, 2023), <https://www.uschamber.com/employment-law/unions/biden-administrations-whole-of-government-approach-to-promoting-labor-unions-hurts-workers-employers-economy#:~:text=To%20meet%20this%20pledge%2C%20the,for%20unions%20above%20all%20others> [https://perma.cc/8C5Q-6S4K].

159. Press Release, NLRB, *National Labor Relations Board and Consumer Financial Protection Bureau Announce New Partnership to Address Employer Surveillance, Monitoring, Data Collection, and Financial Practices in the Workplace* (Mar. 7, 2023), <https://www.nlr.gov/news-outreach/news-story/national-labor-relations-board-and-consumer-financial-protection-bureau#:~:text=As%20our%20economy%2C%20industries%2C,without%20interference%20or%20adverse%20consequences> [https://perma.cc/9U92-RFEL].

160. *Waterbury Cmty. Antenna, Inc. v. NLRB*, 587 F.2d 90, 99 (2d Cir. 1978).

161. See Ryan, *supra* note 17; see also Scherer, *supra* note 135; Swirsky, Forman, Glasser, De Biasi & Madia, *supra* note 24.

162. See Garden, *supra* note 105, at 68.

relevant sentences are unsupported, so it should come as no surprise that the GC's Memo failed to do the same. Indeed, the author even states in a footnote that "[t]he proposal is laid out here only briefly, to be elaborated in future work," which was never released.¹⁶³ Alas, these three meager sentences have somehow created a new governmental regulatory framework for important workplace technologies.

This Part explains why the legal framework outlined in the GC's Memo is flawed and argues that the approach should be rejected and abandoned. This Part also discusses how the GC's Memo threatens to undermine employer compliance efforts related to anti-discrimination, anti-harassment, and occupational health and safety.

A. Flawed Approach

First, the GC's Memo does not distinguish lawful from unlawful monitoring and, worse, does not propose a framework to accomplish the task.¹⁶⁴ Thus, the proposed standard is almost impossible to meet. As noted earlier, the General Counsel's failure to provide examples of surveillance and management practices that the NLRB should presume are unlawful means that the presumption would effectively extend to *any* form of electronic monitoring regardless of whether the practice is covert, occurs at the employer's property, or is used when the employee considered on duty.¹⁶⁵ Not surprisingly, in the aftermath of the GC's Memo, a broad range of AI-powered technologies routinely used by employers are now at risk, including monitoring employee movements via GPS, wearable devices, surveillance camera systems used for security, and radio-frequency identification cards and badges.¹⁶⁶ Practitioners have explained that the GC's Memo may cause some employers to abandon "valuable safety, security, efficiency and . . . compliance benefits that are potentially critical" to financial success in an increasingly competitive marketplace.¹⁶⁷ Vital safety and security devices, such as security video monitors and video and electronic surveillance systems required of food processors and other highly regulated industries for which real-time recording is critical, will likely fall within the General Counsel's broad sweep.¹⁶⁸

163. *Id.*

164. *See* Swirsky, Forman, Glasser, De Biasi & Madia, *supra* note 24; *see also* Mem. GC 23-02, *supra* note 22.

165. *See* Mem. GC 23-02, *supra* note 22.

166. Hinton, Hodjat & Jedreski, *supra* note 146.

167. Bernstein & Miller, *supra* note 26.

168. *Id.*

Second, because the GC's Memo leaves critical terms undefined, companies are left with uncertainty regarding workplace technologies. Under the proposed framework, an employer will be excused from disclosures only if it can demonstrate "special circumstances," which is not defined in the GC's Memo.¹⁶⁹ Similarly, the GC's Memo does not identify the standards for determining whether business needs "outweigh" employees' Section 7 rights. The GC's Memo cautions that software cannot set such a "breakneck pace" that an employee is "severely limit[ed] or completely prevent[ed]" from engaging in protected activities, but the document does not specify what constitutes a "breakneck pace."¹⁷⁰ The thrust of the NLRA is whether the technology violates protected rights regardless of the pace of technological tools.

Third, while the GC's Memo acknowledges that employers have legitimate business reasons for using electronic monitoring and automated management, the document fails to identify any specific legitimate business reasons that would pass muster under the proposed framework.¹⁷¹ The draconian ban on AI and emerging technologies is a poorly designed proposal that fails to account for the diversity of AI tools and employers' objectives with using these tools. Indeed, there are many legitimate business purposes for employee monitoring, including detecting and mitigating cybersecurity threats, ensuring compliance with workplace guidelines, preventing discrimination, harassment, and workplace violence, and providing for workplace health and safety.¹⁷² In the human resource context, AI and algorithms have been shown to reduce subjectivity in employment decisions, encourage fairness, and make workplaces safer and more accessible.¹⁷³ The fact that these technologies are ever-changing makes the proposed framework simply unworkable.

Fourth, the GC's Memo may practically nullify legitimate workplace practices due to the chilling effect of the test. More specifically, because the GC's Memo does not identify "intent" as a significant factor for whether the NLRA is violated, an employer potentially could violate the Act if an action "could inhibit" protected activities, regardless of an employer's intent.¹⁷⁴ Such results again fail to balance employers' and employees' rights by presuming any use of workplace technologies and AI is action in bad faith under the Act.

169. See Horton, *supra* note 136.

170. Mem. GC 23-02, *supra* note 22, at 7.

171. *Id.* at 7–8.

172. Bales & Stone, *supra* note 5, at 21.

173. See Sonderling, Kelley & Casimir, *supra* note 1, at 4.

174. Bernstein & Miller, *supra* note 26.

The presumption contradicts the Supreme Court's admonition that the NLRA "is not intended to serve either [labor or business's] individual interest, but to foster in a neutral manner a system in which the conflict between [employer and employee] interests may be resolved."¹⁷⁵ Indeed, labor policy balances the benefits and burdens neutrally among employers, employees, and unions to avoid the strife and unrest historically associated with labor disputes that may negatively impact the public's interest.¹⁷⁶ The practical effect of such an approach is that the General Counsel is denying an employer's right to use AI neutrally, to ensure productivity and discipline. The General Counsel's position that monitoring tools are unlawful if they "would tend to interfere with or prevent a reasonable employee from"¹⁷⁷ exercising their rights under Section 7 of the NLRA is an overreach. Under the proposed framework, the mere maintenance of a practice may be enough for the Board to find that an employee would think their rights were being violated even if the existence of the practice had no actual impact. The General Counsel's mandate "that employers narrowly tailor their use of monitoring technologies" is a similar overreach since practically any technology could, at least theoretically, interfere with workers' rights under the NLRA.¹⁷⁸

Unfortunately, this interpretation of the NLRA outlined in the GC's Memo will ultimately harm the workers the General Counsel purportedly seeks to protect. AI-enabled technologies are adding new ways to make the workplace more directly accessible to people with disabilities while simultaneously broadening employment opportunities for disabled workers.¹⁷⁹ These technologies expand employment opportunities for disabled workers by expanding the universe of positions for which disabled individuals are qualified. Likewise, AI is also helping disabled workers with reasonable accommodations in the workplace.¹⁸⁰ "Equally impressive, these AI technologies simultaneously reduce the number of work-related ailments and absences due to illness and disability . . ."¹⁸¹ As noted earlier, AI is increasingly used to monitor and report on driver safety and productivity.¹⁸² An employer's right to maintain discipline and productivity should not be improperly sacrificed in the name of protecting alleged concerted activity,

175. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 680–81 (1981).

176. *See* 29 U.S.C. § 151.

177. Mem. GC 23-02, *supra* note 22, at 8.

178. *See* Ryan, *supra* note 17.

179. Sonderling, Kelley & Casimir, *supra* note 1, at 19.

180. *Id.* at 20.

181. *Id.* at 19.

182. *Id.* at 33.

especially purely speculative activities. The text and purpose of the NLRA require a proper balancing of employee and employer interests.

Fifth, existing NLRB law is already well-equipped to handle instances when employers use AI-driven tools in an illegal manner.¹⁸³ Even though the NLRA was enacted almost a century ago, it applies with equal force to modern day technologies. The GC's Memo admits this much. Indeed, the bulk of the GC's Memo highlights how existing Board law can be applied,¹⁸⁴ which strongly militates in favor of the argument that new laws or amorphous frameworks are unnecessary. This is also true for the use of AI in other employment law areas. For example, one EEOC Commissioner and his staff have argued that "the federal anti-discrimination statutes that the EEOC administers and enforces apply with equal force to decisions made by algorithms as they do to decisions made by individuals," even though most of these laws were enacted more than half a century ago.¹⁸⁵ Similar arguments have been made regarding AI and workplace technologies that implicate the Fair Labor Standards Act.¹⁸⁶

Sixth, the notice and reporting requirements would be a significant expansion of the Act by the NLRB. Some states already require employers to inform workers if they use electronic surveillance, and any additional notice requirement should come from legislatures, not the NLRB.¹⁸⁷ Additionally, commentators contend that the disclosure requirements likely undermine the productivity-enhancing purposes of the systems as a whole.¹⁸⁸ In a similar way, the General Counsel's instruction that NLRB regional offices require employers to report expenditures on electronic management technology to the DOL's Office of Labor-Management Standards under Form LM-10 as part of any settlement of such charges is outside the scope of reporting requirements.¹⁸⁹ At bottom, employers must report, among other things, payments for the purpose of interfering with employees in the exercise of their bargaining or

183. See Ryan, *supra* note 17.

184. Mem. GC 23-02, *supra* note 22, at 1, 3–6, 9.

185. Sonderling, Kelley & Casimir, *supra* note 1, at 10.

186. See Kelley, *supra* note 12, at 264 (concluding that AI will ultimately improve compliance with wage and hour laws).

187. See Ryan, *supra* note 17.

188. David Phippen, *NLRB General Counsel Proposes Crackdown on Employers Who Monitor Employees*, CONSTANGY, BROOKS, SMITH & PROPHETE, LLP (Nov. 7, 2022), <https://www.constangy.com/newsroom-newsletters-1179> [<https://perma.cc/ZF48-FC2M>].

189. *Id.*

representation rights.¹⁹⁰ In the case of workplace technologies, even if misused, they were not purchased by the employer for an improper purpose. Rather, the supervisor (or whomever) that is responsible for the unfair labor practice was acting *ultra vires*. Requiring these reports to be filed when none are due enables the government to inconvenience employers and helps create advantageous conditions for union activity. The reporting requirement in the GC's Memo triggers confidentiality concerns as well, since the misuse of submitted information is oftentimes the direct result of the availability of too much unnecessary and irrelevant reporting.

Seventh, the GC's Memo will also impair remote work and therefore hurt employee morale, retention, productivity, and security. In addition to enhancing employee productivity, electronic monitoring often makes it possible for employers to allow employees to work remotely.¹⁹¹ COVID-19 accelerated the nationwide movement toward work-from-home arrangements, and many employers have increased their use of technological tools to effectively manage their increasingly off-site workforces.¹⁹² Many employers struggle to engage with employees, maintain productivity, ensure the security of IT systems, and otherwise manage their workplace. Employers, especially those with remote workforces and "employees who [routinely] travel for work, have an interest in ensuring that their employees are actually working. This is particularly relevant in the work from home culture where managers are not physically present to ensure employees are working when they say they are."¹⁹³

Eighth, the General Counsel's focus on interagency agreements raises several concerns. In short, these agreements provide a conduit to bring together agencies that ordinarily operate separately. Connecting these separate agencies that Congress established with responsibility for enforcing different laws outside of their specialized area generates noteworthy problems.¹⁹⁴ For instance, "giving an agency a role in enforcing a law that[] [is] outside" the

190. See generally *FORM LM-10 - Employer Reports Frequently Asked Questions*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/olms/reports/forms/lm-10/faq> [<https://perma.cc/9RFW-MKND>].

191. See Kelley, *supra* note 12, at 264.

192. *Id.*

193. M. Scott McIntyre & Sean P. Ryan, *NLRB Voices Concerns About Electronic Surveillance and Automated Management Practices*, SHRM: EMP. LAW (Nov. 29, 2022), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/nlr-electronic-surveillance-ai.aspx> [<https://perma.cc/S5TH-V79A>].

194. See generally Jon Steingart, *Labor Agency Unity Makes Talking To One Like Talking To All*, LAW360 (Sept. 26, 2023, 3:56 PM), <https://www.law360.com/employment-authority/articles/1724604/labor-agency-unity-makes-talking-to-one-like-talking-to-all> [<https://perma.cc/4AH6-ASJV>].

scope of its specialty triggers confidentiality concerns.¹⁹⁵ “When data is shared or complaints are referred, . . . the receiving agency [does not] have the same familiarity with the confidentiality provisions.”¹⁹⁶ Critics of agencies focusing on interagency agreements argue that the agreements are self-serving for the government and that agencies should instead prioritize providing compliance assistance to the public, so the regulated community can better understand how to comply with the law.¹⁹⁷

There are several other flaws with the proposal. For example, practitioners have explained that the GC’s Memo disregards existing law.¹⁹⁸ For instance, the claim that “excessive workloads” may “prevent workers from taking their breaks together or at all”¹⁹⁹ is disconnected from existing law that allows employers to require their employees to work at set times and establish a workload during that time period.²⁰⁰ In a similar vein, practitioners argue that the GC’s Memo fails to account for the real world fact that management lawfully can be present in non-working areas and during employees’ non-working time for legitimate, lawful employer purposes, including personal reasons such as talking, eating lunch, and having coffee.²⁰¹ Commentators have also noted that even though labor unions are increasingly using the same AI technology as employers, the GC’s Memo fails to identify any activities committed by unions that could violate the NLRA.²⁰²

At the end of the day, the proposed framework was poorly considered. Ultimately, the proposal will not result in more protection for employees, but instead, it will only result in unnecessary litigation and place employers in an impossible no-win situation.

B. Discrimination, Harassment, and Occupational Health and Safety Concerns

The GC’s Memo outlines a position that fails to recognize that many AI practices at issue are driven by compliance with several employment laws and

195. *Id.*

196. *Id.*

197. *Id.*

198. Phippen, *supra* note 188.

199. Mem. GC 23-02, *supra* note 22, at 7.

200. Phippen, *supra* note 188.

201. *Id.*

202. Jennifer G. Betts & Danielle Ochs, *New NLRB General Counsel Memorandum Continues Trend of Increasing Oversight of Employer Technology Use*, OGLETREE DEAKINS (Nov. 7, 2022), <https://ogletree.com/insights/new-nlr-general-counsel-memorandum-continues-trend-of-increasing-oversight-of-employer-technology-use/> [<https://perma.cc/4XU8-PUB7>].

regulations, particularly in the areas of anti-discrimination, anti-harassment, and occupational health and safety. Federal anti-discrimination laws such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and similar state and local laws were enacted to protect employees generally as well as to protect those who are in statutorily protected classes.²⁰³ Importantly, these laws require employers to avoid, to the extent possible, discrimination and harassment in their workplaces.²⁰⁴ The Supreme Court has long recognized the maintenance and enforcement of anti-harassment workplace rules and policies as evidence of reasonable care taken by employers to prevent harassment that is necessary to establish an affirmative defense against such claims.²⁰⁵

Unfortunately, the extremely broad approach to AI and other emerging technologies, based on the General Counsel's belief that speech under the NLRA for employees overrides all other concerns, will directly conflict with federal, state, and local anti-discrimination laws that protect against workplace harassment and discrimination. Because of the NLRB's overly aggressive anti-employer position, employers are now uncertain about whether to comply with the competing guidance from the NLRB's General Counsel on what conduct remains protected by the NLRA and the requirements under federal anti-discrimination laws to maintain a workplace free from harassment and discrimination.²⁰⁶ This is especially important since AI is commonly used to monitor harassment, which has been especially vital with the explosive growth of harassment in the age of remote work with the COVID-19 pandemic.²⁰⁷ Since the start of the pandemic, employees have felt as if online environments are the Wild West where the traditional workplace rules do not apply. Many commentators have explained that "remote work [has] made it easier for some employees to exert power over those who were comparatively vulnerable . . . because the channels through which remote work occurs—[i.e.,]

203. See generally Sonderling, Kelley & Casimir, *supra* note 1.

204. *Id.* at 70 (explaining that "voluntary compliance remains a critical component of federal anti-discrimination law").

205. See, e.g., Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

206. See Erin Norris Bass, *Practical Guidance for Employers on Confidentiality Provisions That Survive NLRB Scrutiny*, 34 A.B.A. J. LAB. & EMP. L. 113, 113–14 (2019) (noting that this includes all of the anti-discrimination laws).

207. Dave Zielinski, *Predicting Misconduct: How AI Helps Head Off Harassment, Bias and Other Ethics Issues*, SHRM: ETHICAL PRAC. COMPLIANCE (Nov. 23, 2021), <https://www.shrm.org/hr-today/news/hr-magazine/winter2021/pages/next-generation-technologies-transform-misconduct-reporting-.aspx> [<https://perma.cc/MZ4L-7JV8>].

text, phone, video—are often unmonitored.”²⁰⁸ Kalpana Kotagal, a recently confirmed EEOC Commissioner and former civil rights and plaintiffs’ employment attorney,²⁰⁹ has explained that the knowledge that no one is watching can embolden a hostile work environment because an in-person office setting often involves bystanders who can be “a source of protection if they are trained, able or brave enough to step up.”²¹⁰ Monitoring employee communications may also provide employers the opportunity to initiate and enhance harassment investigations and take remedial action. Ultimately, employers should not be placed in a catch-22 in which they are subject to unfair labor practice violations under the NLRA and anti-discrimination law violations that can be brought by agencies, unions, and employees.²¹¹ Accordingly, employer workplace policies that prohibit abusive and hostile language and conduct, and that require employees to treat others professionally and with dignity, are vital legal compliance tools for employers in order to fulfill their obligations under such laws. As a consequence, the absence of or inability to maintain and enforce such rules exposes employers to greater legal liability. Equally important, these workplace policies and practices are important tools for providing employees the types of workplaces that federal and state legislatures have deemed essential productive workplaces.

Workplace harassment and discrimination have been consistently linked to increased rates of employee depression, worker stress, and decreased productivity.²¹² Workplace civility monitoring tools are important tools in this regard. The clear objective of many monitoring practices is to prevent harassment, which can lead to numerous adverse effects on employees and their employers. Such practices are clearly not an attempt to reduce the ability of employees to engage in protected concerted activity, which they can engage in without harassing behavior directed against fellow employees.

208. Leah Fessler, *Workplace Harassment in the Age of Remote Work*, N.Y. TIMES (June 8, 2021), <https://www.nytimes.com/2021/06/08/us/workplace-harassment-remote-work.html> [<https://perma.cc/LS2T-ND3L>].

209. *Kalpana Kotagal, Commissioner*, EEOC, <https://www.eeoc.gov/kalpana-kotagal-commissioner> [<https://perma.cc/YZS3-C2PD>]. Kotagal joined the EEOC as a Commissioner on August 9, 2023. *Id.* Prior to becoming an EEOC Commissioner, Kotagal was a partner at Cohen Milstein in the Civil Rights and Employment Group. *See* Fessler, *supra* note 208.

210. *See* Fessler, *supra* note 208.

211. Christine Neylon O’Brien, *Twenty-First Century Labor Law: Striking the Right Balance Between Workplace Civility Rules That Accommodate Equal Employment Opportunity Obligations and the Loss of Protection for Concerted Activities Under the National Labor Relations Act*, 12 WM. & MARY BUS. L. REV. 167, 215 (2020).

212. Carly Thelen, *Hate Speech as Protected Conduct: Reworking the Approach to Offensive Speech Under the NLRA*, 104 IOWA L. REV. 985, 1002 (2019).

In addition to the anti-discrimination conflicts, the GC's Memo weakens, even undermines, the OSH Act's requirement that employers provide a workplace that is "free from recognized *hazards* that are causing or are likely to cause death or serious physical harm to [their] employees."²¹³ The OSH Act was enacted to (1) "encourag[e] employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment"; (2) "stimulate employers and employees to institute new . . . programs for providing safe and healthful working conditions"; and (3) "encourag[e] joint labor-management efforts to reduce injuries and disease arising out of employment."²¹⁴ The General Counsel's heavy-handed position will effectually prevent companies from using important AI-powered tools to ensure worker safety. AI and machine learning enable businesses to "significantly reduce the number of accidents and worker injuries in the workplace[,] . . . improve . . . workers' wellness, avoid costly litigation, and minimize other costs related to fatal and non-fatal injuries."²¹⁵ But the General Counsel's position would deny, or at a minimum deter, businesses from using this critical technology, thus placing employers between a rock and a hard place. Again, this places employers in an untenable situation where they are subject to suit for unfair labor practices under the NLRA or OSH Act violations. Recent OSHA enforcement actions against some large companies are illustrative. In 2023, OSHA announced a \$60,000 proposed fine against a company for safety violations at three of the company's facilities, alleging that "workers were at a high risk for back injuries and musculoskeletal disorders."²¹⁶ According to OSHA, workers at some of the company's warehouses faced a higher level of risk for lower back and shoulder injuries, exposure to high ambient temperatures, and workers were incurring injuries from handling packages.²¹⁷ In a statement, OSHA's Assistant Secretary Doug Parker alleged: "While [the company] has developed impressive systems to make sure its customers' orders are shipped efficiently and quickly, the company has failed to show the same level of commitment to protecting the safety and well-being

213. See 29 U.S.C. § 654(a) (emphasis added); *Metzler v. Arcadian Corp.*, No. 96-60126, 1997 U.S. App. LEXIS 12693, at *12 (5th Cir. Apr. 28, 1997) ("[F]ocus is on an employer's duty to prevent hazardous conditions from developing in the employment itself or the physical workplace.").

214. 29 U.S.C. § 651(b)(1), (13).

215. See *Minaieva*, *supra* note 68.

216. See Beverly Banks, *3 Amazon Facilities Have Serious Safety Issues, OSHA Says*, LAW360 (Jan. 18, 2023, 9:19 PM), <https://www.law360.com/employment-authority/labor/articles/1566755/3-amazon-facilities-have-serious-safety-issues-osh-says> [<https://perma.cc/M8KJ-3SJ7>].

217. *Id.*

of its workers.”²¹⁸ But if the company looked to AI, which has been proven to reduce injuries and fatalities and help warehouse workers perform the very tasks identified in the enforcement action, the company would be at risk of being subject to NLRA violations.

On a related note, the General Counsel’s position articulated in the memorandum also likely conflicts with employers’ requirements under the OSH Act to maintain workplaces free from safety hazards related to workplace violence.²¹⁹ OSHA takes the position that workplace violence may be covered by its general duty clause and broadly covers “any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site.”²²⁰ To reduce these hazards, OSHA recommends that employers identify methods for reducing the likelihood of incidents occurring, including engineering controls and administrative controls.²²¹ AI-driven systems can be used to mitigate work-related violence and harassment risks by detecting patterns and identifying or predicting risks to find the best way to minimize such risks.²²² Scholars have explained that employers have legitimate reasons to use AI to monitor employees’ off-duty and online conduct. For instance, a social media post that includes a “company’s name and words or phrases like ‘gun’ or ‘shoot’ or ‘blow up’ could be a red flag for impending workplace violence.”²²³ A related example is if a social media post indicates illegal drug use or excessive alcohol use could trigger workplace safety concerns.²²⁴ But using AI-systems to identify or address work-related violence and workplace safety would now put employers in a position where they are at risk of NLRA violations.

At the end of the day, the best way for employers to preemptively comply with these laws is to maintain workplace policies that regulate employee behavior before it escalates to illegal conduct. But employers who abandon or significantly curtail their workplace practices out of concern with the standard contained in the GC’s Memo could face liability under these other laws. And vice versa. The Board’s AI standard should not force employers to endure

218. *Id.*

219. See 29 U.S.C. § 654 (the OSH Act General Duty Clause); OSHA, *Workplace Violence: Enforcement*, U.S. DEP’T LAB., <https://www.osha.gov/workplace-violence/enforcement> [<https://perma.cc/V53W-UMCA>] (taking the position that workplace violence may be covered by the General Duty Clause).

220. OSHA, *Workplace Violence: Enforcement*, *supra* note 219.

221. *Id.*

222. Bales & Stone, *supra* note 5, at 21.

223. *Id.*

224. *Id.*

employee harassment, discrimination, or other misbehavior until it reaches the threshold of legal impropriety. Nor should it create liability risk for employers who conscientiously and preemptively address employee workplace behavior in accordance with federal, state, or local law. The general counsel of a federal agency should not put employers in the position of violating one set of laws to comply with another. Likewise, federal agencies should not make compliance with numerous anti-discrimination and workplace safety laws and regulations unnecessarily difficult and unduly burdensome.

C. An Inappropriate Vehicle to Change Law

The GC's Memo improperly attempts to change the law by issuing memoranda. As chief labor prosecutor, the NLRB General Counsel is attempting to create policy not by using her valid statutory authority to investigate and prosecute cases when unfair labor charges are filed,²²⁵ but rather by issuing memoranda. Congress delegated to the NLRB, not its General Counsel, the authority to make rules or regulations necessary to carry out the provisions of the NLRA.²²⁶ Scholars, including the one who seemingly inspired the new proposed framework, have explained that the NLRA is silent regarding employer surveillance and that "employers are mostly free to implement surveillance measures for purposes such as promoting productivity or improving security, even if those measures could also chill union organizing."²²⁷ Additionally, General Counsel Abruzzo's excessive use of memoranda has put employers in an untenable dilemma: The law they base decisions on may not be the law the NLRB uses to judge them.²²⁸ As one practitioner explains: "[I]n the age of the NLRB general counsel memo, employers and their labor counsel have to adjust their behavior not just to where the law is currently, but also to where it might go."²²⁹ This is particularly egregious because employers cannot depend on NLRB law only applying prospectively since General Counsel Abruzzo has argued in other memoranda that "Board cases are presumed to be applied retroactively."²³⁰

225. See 29 U.S.C. § 153(d).

226. See 29 U.S.C. § 156.

227. See Garden, *supra* note 105, at 55 (contending that "[t]his has been true since the days when workplace surveillance mostly had to be accomplished by human beings, conjuring up men in trench coats who would follow workplace rabble-rousers to the union hall in the evenings").

228. See Johns, *supra* note 120.

229. *Id.*

230. *Id.*

VI. RECOMMENDATIONS: CONSIDERATIONS FOR ALTERNATIVE APPROACHES AND RECOMMENDED PRACTICES

Because the GC's Memo is deeply flawed, this Part discusses key considerations for any new frameworks for effective workplace practices that balance employee rights to engage in protected concerted activity and an employer's right to use workplace technologies to maintain productivity, discipline, and safety. Regardless of which framework will ultimately be adopted by the NLRB, this Part offers some recommendations that may help employers comply with the NLRA, reduce the risks associated with workplace technologies and AI, diminish uncertainty, protect employees, and not foreclose or limit future AI innovations that may add value for employees and employers.

A. *Alternative Approaches*

Instead of adopting the draconian approach outlined in the GC's Memo, the Board should consider alternative approaches when deciding cases challenging employer monitoring and automation practices. First and foremost, the NLRB should engage in notice-and-comment rulemaking to construct any possible new framework and not act through memoranda or adjudications.²³¹ There are myriad benefits with the NLRB acting through rulemaking rather than adjudication.²³² Pursuing policy, and especially changes in policy, through

231. Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. 1469, 1471 (2015) ("For decades now, academics and courts have been calling on the [NLRB] . . . to use its rulemaking authority, rather than relying nearly exclusively on announcing legal principles through adjudication.").

232. The benefits of rulemaking over adjudication include:

- (1) rules provide a valuable source of decisional standards and constraints on agency discretion;
- (2) rules enhance efficiency by simplifying and expediting agency enforcement efforts;
- (3) rules enhance fairness by providing affected members of the public easily accessible, clear notice of the demarcation between permissible and impermissible conduct and by insuring like treatment of similarly situated individuals and firms;
- (4) rulemaking enhances the quality of agency policy decisions by focusing on the broad impacts of alternative rules and invites participation by all potentially affected groups and individuals;
- (5) rulemaking enhances efficiency by allowing an agency to resolve recurring issues of legislative fact once instead of relitigating such issues in numerous cases;
- (6) rulemaking enhances fairness by allowing the public to participate in the decision-making process that determines the rules that apply to their conduct; and
- (7) rulemaking enhances the political accountability and legitimacy of agency policy making by providing the general public, the President, and Congress advance notice of an agency's intent to make major policy decisions and an opportunity to influence the policies ultimately chosen by the agency.

memoranda or adjudications rather than a rulemaking or a public guidance document undermines the democratic values of accountability, transparency, public participation, and reflective, reasoned decision making embodied in the Administrative Procedure Act.²³³ Due to the lack of public scrutiny or the compromises inherent in deliberative processes like rulemaking, policy established by memoranda and adjudications will exacerbate the increased instability in labor law by ensuring future flip-flopping and fluctuations on such important issues. These fluctuations generate instability in many industries, cause widespread confusion among employees, employers, unions, and others, and require unnecessary legal costs. Furthermore, establishing policy by memoranda can result in sharper political fluctuations that are not subjected to public scrutiny or the compromises embodied in deliberative processes such as rulemaking.²³⁴

Notice-and-comment is particularly important with newer workplace technologies and AI because public comments can help improve the guidance by providing outside parties the opportunity to provide meaningful feedback, including pivotal responses from industry experts.²³⁵ Given the relative infancy of AI-related issues, it is axiomatic that guidance is most effective when employees and employers may rely on it. Rules and other sub-regulatory guidance that oscillates from one presidential administration or Congress to the next is of minimal utility in this context. Ultimately, clear, comprehensive, and reasonable guidance that is enforced predictably and consistently will help encourage employers and technology vendors to proactively prevent negative effects of these technologies. Moreover, such guidance reduces uncertainty and protects workers, employees, applicants, unions, and others without stifling innovation.²³⁶

Proponents of adjudication and memoranda will likely respond that it gives the NLRB the flexibility to adjust standards as novel situations arise or as the agency gains experience. They will likely also contend that adjudication forms policy incrementally in contrast with the instantaneous impact of a formal

Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 189 (1996).

233. *Id.*

234. *Id.*; see also Keith E. Sonderling & Bradford J. Kelley, *The Sword and the Shield: The Benefits of Opinion Letters by Employment and Labor Agencies*, 86 MO. L. REV. 1171, 1200–01 (2021) (noting that these sharp fluctuations are at odds with good governance and stability for many industries).

235. See Sonderling, Kelley & Casimir, *supra* note 1, at 42 (arguing that notice-and-comment is especially critical in the AI arena because of the pressing need for expert feedback).

236. *Id.*

rule.²³⁷ However, these points can be easily dismissed. Adjudicative decisions are fact-specific and thus may not be relied on to the same extent as broad, concrete rules. Moreover, adjudicative precedent under the NLRA has proven to be wildly unstable.²³⁸

There are several key considerations that should guide the NLRB during notice-and-comment. An effective approach towards workplace AI practices should presume that such rules and policies are valid unless they are actually violative of the NLRA or have been applied in a discriminatory manner, including being used to interfere with union or employee organizational activity. For facially neutral practices, the Board should then require a showing that the practice in question has actually been applied or enforced in a manner that has directly resulted in an alleged restriction of an employee's right to protected concerted activity. Any framework must give appropriate weight to both employees' Section 7 rights and employers' legitimate business interests in maintaining monitoring and AI practices.

In contrast with the General Counsel's one-size-fits-all approach, the Board should adopt a framework to allow it to engage in a more refined evaluation of significant variables, including distinctions between different types of protected activities and monitoring practices, different justifications, particular work settings or industries that have unique characteristics, and specific events that might reveal the importance of a particular practice. Any framework ultimately adopted must be able to accommodate the widespread benefits of workplace technologies while still safeguarding Section 7 employee rights. The approach contained in the GC's Memo imposes too many restrictions on the Board itself, and a more refined analysis advances what the Supreme Court has recognized is the Board's "special function" of applying the Act's "general provisions . . . to the complexities of industrial life."²³⁹ Thus, any future standards should seek to improve clarity without sacrificing necessary protections or inhibiting technological innovation.

Alternative approaches driven by these important considerations will lead to predictable and reasonable results and guard against the creation of hypothetical "reasonable employees" and subsequent conjecture that the implementation of such rules could "chill" or interfere with employees' Section

237. Andrew F. Boccio, Note, *Student Assistants and the NLRB: A Call for Notice-and-Comment Rulemaking*, 48 SETON HALL L. REV. 193, 217 (2017).

238. Eigen & Garofalo, *supra* note 96, at 1885.

239. NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963); *see also* NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

7 rights. These considerations also provide consistency and stability to workplace monitoring practices and do not punish or subject employers to liability for not having actually violated the law. In addition, simplifying the test will provide greater clarity for employees, unions, employers, and the public. Any ultimate test adopted should require the Board to engage in clear and transparent decision-making, minimize second-guessing of employer practices, and provide courts with a clearly understood approach to any appeals they may be required to consider regarding workplace technological practices.

B. Recommended Practices

Regardless of what direction the NLRB goes, now is a critical time for employers to take proactive mitigation measures to avoid certain practices that may run afoul of the NLRA. To better protect themselves against NLRA violations, employers should adopt recommended practices for using automation technology and surveillance tools.²⁴⁰ At this time, the General Counsel's proposed standard for evaluating the legality of electronic management tools is only a proposal and will not be the law unless and until the NLRB adopts or endorses it. Put differently, to become law, the NLRB would need to embrace the GC's Memo in a decision in an individual case involving AI or electronic management.²⁴¹ With that said, the GC's Memo suggests that the General Counsel will seek to bring complaints against employers using these tools to set up a case for Board consideration. As a result, employers should consider practices to reduce any exposure to NLRA liability. These recommended practices are designed to be a starting point for companies to reduce any NLRA exposure. Companies that develop and use workplace technologies should be forward-thinking as they evaluate and address potential risks unique to their operations.

Even though the current regulatory environment makes it difficult to assess risks with certainty, at least some of these risks can be managed by adhering to a few core principles when it comes to administration of employee monitoring practices. First and foremost, employers should evaluate their AI and monitoring practices to determine whether any of their practices might violate the NLRA.²⁴² One effective way employers can accomplish this is to conduct

240. See Golden, *supra* note 81.

241. See Scherer, *supra* note 135.

242. See Lisa Feldman, *NLRB General Counsel Issues Memo on Electronic Monitoring, Artificial Intelligence and Employee's Section 7 Rights*, JD SUPRA (Nov. 10, 2022), <https://www.jdsupra.com/legalnews/nlr-general-counsel-issues-memo-on-7110228/> [<https://perma.cc/K4DB-435D>].

audits. Practitioners recommend that employers preliminarily audit their AI practices by reviewing key questions, including whether a business has a need for the technology and whether the technology is being used in a punitive way.²⁴³ Other useful inquiries include assessing the contours of the technology's decision-making and whether it is being used in a discriminatory manner. Employers should also focus on the data being collected, including asking what specific data is being collected. More specifically, employers should ask about details regarding whether data is being collected from employees' off-the-clock activities. Importantly, these reviews should encompass "any algorithmic decision-making tools used to screen or hire employees, or to make decisions regarding promotions, pay, or discipline, to ensure they do not inadvertently take protected activity into account."²⁴⁴ Some practitioners recommend that employers "consider a 'stress test' exercise whereby they consider a potential NLRB investigation and corresponding requests for information on the scope of electronic monitoring and related systems in the workplace, and any written policies or protocols describing those systems."²⁴⁵

Second, employers should strive for transparency and explainability to promote and maintain reliability, trust, credibility, and a general understanding of AI systems.²⁴⁶ Transparency promotes the visibility of processes, the accessibility of systems, and the reporting of meaningful information, whereas explainability fosters trust in the process. To do so, transparency and explainability require open, detailed, and clear communication regarding what technologies are being used, their purpose, how they work, the specific information that is collected, to whom it will be disclosed, how it will be used, and how data will be retained.²⁴⁷ An important consideration to accomplish transparency and explainability is whether employees are informed or aware of the technology being used by their employers.²⁴⁸ Another consideration for

243. See Steven Porzio & Ethan Picone, *NLRB General Counsel Abruzzo Issues Memo on Employer Surveillance in the Modern Workplace*, PROSKAUER (Nov. 1, 2022), <https://www.laborrelationsupdate.com/nlr/nrb-general-counsel-abruzzo-issues-memo-on-employer-surveillance-in-the-modern-workplace/> [<https://perma.cc/54FD-WHGM>].

244. Hinton, Hodjat & Jedreski, *supra* note 146.

245. Crystal S. Carey, Harry I. Johnson, III & David R. Broderdorf, *Electronic Monitoring and Algorithmic Management: Permissible Labor Practice or Unlawful Oversight?* MORGAN, LEWIS & BOCKIUS LLP (Nov. 8, 2022), <https://www.morganlewis.com/pubs/2022/11/electronic-monitoring-and-algorithmic-management-permissible-labor-practice-or-unlawful-oversight> [<https://perma.cc/L7JH-QXAP>].

246. See Sonderling, Kelley & Casimir, *supra* note 1, at 11.

247. *Id.*

248. *Id.*

employers involves training supervisors to administer workplace technological practices to ensure compliance with existing NLRB doctrine.²⁴⁹

Third, if a company uses AI in the workplace to monitor productivity, it should make sure that this practice is used for a good reason.²⁵⁰ Legitimate reasons may include reviewing job descriptions to eliminate unconscious bias, tracking driver safety, and temperature and social distancing checks. Additionally, employers should take steps to document and articulate the legitimate reasons for such practices prior to implementing them and continue to do so thereafter.²⁵¹ To the extent possible, employers should consider limiting the scope of any specific provisions to employee working time, and examine additional ways to narrowly tailor their application based on an employer's distinct business goals.²⁵² Employers should also be mindful of the real world impact of using monitoring tools, including employee stress and low morale resulting from micromanagement, which may result in turnover.²⁵³

Fourth, employers should understand vendor liability. As discussed earlier, many companies enlist the help of outside vendors to support their human resources functions, such as screening applicants. The GC's Memo explains that "if employers rely on [AI] 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."²⁵⁴ As such, government officials and practitioners have emphasized the importance of employers incorporating explicit terms in their agreements with vendors, mandating compliance with all employment laws during the recruitment and screening of potential employees.²⁵⁵ Specifically, employers should consider engaging with their vendors to confirm that their AI tools are not making decisions based on protected activity under the NLRA as well as any other labor and employment laws, including state and local laws.²⁵⁶

Fifth, employers should contemplate the possible remedies that might apply to their conduct in the event that the NLRA is applied retroactively to their

249. Bernstein & Miller, *supra* note 26.

250. Amy Schuh, *How AI Can Be Used Ethically to Monitor Worker Productivity*, BLOOMBERG LAW, (Dec. 13, 2022, 3:00 AM), <https://www.bloomberglaw.com/bloomberglawnews> [<https://perma.cc/HU6C-2GLA>].

251. Bernstein & Miller, *supra* note 26.

252. *Id.*

253. See Ward, *supra* note 43.

254. See Mem. GC 23-02, *supra* note 22, at 5.

255. See Sonderling, Kelley & Casimir, *supra* note 1, at 85.

256. See Golden, *supra* note 81.

actions.²⁵⁷ These remedies should be weighed in making decisions regarding the use of AI and emerging technologies in the workplace. This is particularly important since the General Counsel has stated that she “seeks to substantially expand the remedies employers face for labor law violations.”²⁵⁸

Finally, employers should track changes in the law that might affect NLRA compliance. Employers should also be aware of any other federal regulatory requirements that might be implicated by using monitoring technologies as well as state and local laws that may be applicable, including electronic monitoring disclosure laws and privacy laws.²⁵⁹ Similarly, employers should track changes in the law that might affect NLRA compliance, including changes domestically and internationally since many countries and international organizations are in the process of developing new laws and regulations surrounding the use of AI and automation in the workplace.²⁶⁰ Ultimately, a comprehensive understanding of the NLRA landscape will simultaneously benefit any self-audits that employers perform.

VII. CONCLUSION

At minimum, recent activity at the NLRB signals major implications for both unionized and non-union employers who rely upon AI and related technologies to bolster operations. Workplace technologies and AI tools serve several important functions and are often fundamental to effectively functioning workplaces. Unfortunately, employers may soon be confronted with a difficult choice between embracing groundbreaking workplace technology and managing the risks of non-compliance with a new regulatory framework for evaluating employee workplace rights.

The Board should not unduly restrict an employer’s ability to maintain and enforce workplace technological practices that are utilized to achieve essential and legitimate business functions. Placing heavy restrictions on employers who use these vital practices will stifle innovation and ultimately hurt the workplace.

257. See Johns, *supra* note 120.

258. *Id.*

259. Paretti, Henderson & Devlin, *supra* note 29.

260. See Sonderling, Kelley & Casimir, *supra* note 1, at 86.

* * *