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Workplace Video Monitoring: What Employers Need To Know

Law360, New York (July 22, 2016, 11:39 AM ET) --
The omnipresence of video cameras is a fact of life. The average American, aware or not, is caught on surveillance camera more than 75 times a day.


Mark A. Konkel

Given the availability and effectiveness of inexpensive video equipment, many companies use video to monitor their entire operations for safety, security and quality control. But video surveillance can have unintended consequences well beyond its intended purpose. For example, one big-box retailer instructed a breastfeeding employee to use the store's computer server room for lactation. After using it two or three times a day, she discovered it had a monitored surveillance camera. Now the company is facing a lawsuit.


Barbara E. Hoey

What are the risks of having video monitoring set up in the workplace? This article addresses federal and state limits on video monitoring in the workplace for both unionized and nonunion workers.

Does Federal Law Prohibit Video Surveillance in the Workplace?

No. There is no explicit prohibition in U.S. federal law against employers monitoring the workplace, including by recording video of workplace activity, except in the case of monitoring workers engaging in "protected concerted activity" (essentially, union-related activity; see below). Elements of the Federal Wiretapping/ Electronic Communications Privacy Act broadly apply to workplace video surveillance, but the act lacks specificity, which means it is left to the states to define what constitutes acceptable video monitoring practices in the workplace (see state laws, below).

Federal Law Exception: Surveillance of "Protected Concerted Activity" Prohibited

Workers who are participating in union organizing activity are subject to special protections against monitoring. These employees are exercising their right to act for their "mutual aid and protection" on behalf of a group of employees under Section 7 of the National Labor Relations Act (hence "protected" and "concerted" activity). Employers may not monitor or record these activities because the monitoring is viewed by the National Labor Relations Board and courts as intimidating or deterring employees from exercising their federal rights. In addition, employers may not use video surveillance in a way that is meant to intimidate current or prospective union members.

The NLRB has been enforcing these rules consistently — and recently. In a recent decision by a NLRB administrative law judge, one large manufacturer was instructed to cease and desist from:

- Photographing and videotaping employees engaged in workplace marches and rallies and/or near its property.
- Creating the impression that its employees' union and/or protected concerted activities are under surveillance.
- Interfering with, restraining or coercing employees in the exercise of their rights.

The NLRB determined that the employer's photography and video surveillance of employees during union solidarity marches interfered with workers' right to organize and improve working conditions.

Note that cameras that also record sound may run afoul of federal wiretapping laws, with or without an otherwise legitimate reason.

Employer Limits on Video Surveillance Depends on State Laws

In addition to protected concerted activity protected by U.S. federal law, U.S. states have placed their own limits on video surveillance. State privacy laws determine the extent to which video surveillance is considered legitimate and therefore lawful. Some states put such privacy limitations in place through specific laws or statutes. In addition, virtually all states recognize a judicially created, common-law claim for invasion of privacy. All such claims, whether under statute or common-law theory, depend on whether employees have a "reasonable expectation of privacy" in various parts of the workplace, or in various activities in the workplace.

Employees do not have a general reasonable expectation of privacy in the workplace, since the workplace is maintained by the employer and "belongs" to the employer. Therefore, the state laws that place limits on video monitoring of the workplace focus only on areas where employees should have a reasonable expectation of privacy, such as in restrooms and break rooms.

California law, for example, prohibits the use of two-way mirrors in restrooms, locker rooms, fitting rooms and similar locations. Connecticut law prohibits employers from video surveillance of areas designed for employee rest and comfort, such as employee lounges. In general, however, unless the video recording by an employer involves areas that common sense suggests employees would expect to be private, there are no limitations on video monitoring of the workplace under state law.

If an employer does engage in video recording where employees would have a legitimate and reasonable expectation of privacy, note that employees whose privacy rights are violated would also have claims against the employer not only under specific statutes that prohibit such recording, but also under common law theories of invasion of privacy (see "Privacy for Certain Employee Activities," below).

Where state law imposes limits on video recording of workplace activity, employers must inform workers that cameras are being used in the workplace.

Privacy for Certain Employee Activities

Even if a state does not specifically regulate workplace privacy, employees cannot be taped or filmed while doing certain things at work, such as using the restroom or changing clothes. That is because, as noted above, employees may have common-law invasion-of-privacy claims (meaning claims that courts have recognized but are not created under specific federal or state statutes).

Where no specific state law imposes limits on video monitoring of the workplace, courts examine two competing interests to determine if an employee's privacy rights have been violated: (1) the employer's need to conduct surveillance, versus (2) the employee's reasonable expectation of privacy. That means that safety-sensitive, security-imperative areas of the workplace will almost always be open to lawful video surveillance.

It also means that common areas of the workplace — a shop floor, common hallways, parking lots, etc. — will almost always be open to video surveillance because employees do not expect that their activities in those areas are private. Where an employer cannot show that employees should not have a reasonable expectation of privacy or a compelling reason for monitoring, a court is more likely to find that employees' reasonable privacy rights have been violated.

Workplace Video Surveillance Best Practices

Employers should develop video monitoring policies that comply with the requirements of various state laws, as well as with employees' right to organized, as defined in Section 7 of the NLRA.

To best protect your company, make sure your video surveillance policy and practices meet these criteria:

- Workplace video surveillance does not include coverage of areas designated for employees' "health or personal comfort" (i.e., restrooms, locker rooms, fitting rooms, break rooms)
- Employees are notified of surveillance practices and know which areas may be monitored
- Employees engaged in protected concerted activity are not targeted for video surveillance

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