Workplace Monitoring and Data Protection in the Federal Sector

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Key Take-Home Points to Remember...

1. *There is a Limited Ability to Bargain Over Management Rights in the Federal Sector*

As a general principal, federal agencies have significant, statutorily-provided latitude in establishing workplace health and safety practices. Specifically, 5 USC 7106 provides (in relevant part) that management has the unfettered authority to determine its "mission, budget, organization, number of employees, and internal security practice." Unions can bargain over the procedures used to implement these management rights and, to a limited extent, the adverse impacts associated with implementation of those rights; however, the substance of these practices is squarely reserved to agency prerogative.

Some key federal cases illustrating managements broad substantive rights to implement and control security practices include:

- In order to establish that a union proposal interferes with management's right to determine internal security practices, an agency must only establish that a policy is reasonably linked to security, not that it is the only possible way of preserving security. NTEU v. FLRA, 550 f.3d 1148 (DC Cir. 2008)

- A proposal that would allow officers at certain airports to sit at podiums while conducting passenger-security inspections fell outside the duty to bargain. DHS, CBP, 70 FLRA 100 (2016)

- A proposal requiring the agency to install plexiglass barriers between officers at airport kiosk podiums and the traveling public, excessively interfered with management's right to determine internal security practices. DHS, CBP, 69 FLRA 355 (2016)

- Proposals to exempt personnel from medical and drug/alcohol testing were outside the duty to bargain. *Department of the Interior,* USGS, Ann Arbor, 66 FLRA 639 (2012)

- An agency's decision to conduct work-related searches is an exercise of the right to determine internal security practices. DOJ, Office of Justice Programs, 60 FLRA 671 (2005). Proposals that

either limited searches of employees' property to only those cases involving reasonable cause to believe the employee attempted to steal something; or called upon management to agree not to conduct unannounced searches of employees, interfered with management's right to determine internal security practices. Scott AFB, 16 FLRA 361 (1984)

- The right to determine internal security practices includes a determination of the investigative techniques an agency will use to achieve internal security objectives... in this case, videotaping investigative interviews. US Customs Service, 56 FLRA 398 (2000)

- A proposal regarding facial hair excessively interfered with the agency's internal security right because it failed to take into consideration the possibility of employees needing to wear respirators or other safety gear in emergency situations. CBP, 62 FLRA 267 (2007)

- The FLRA held non-negotiable a proposal that the union control access to union offices, unless permission was provided to management in emergency situations. VA Richmond, 64 FLRA 231 (2009)

2. *The Inherently Public Nature of Federal Government Work Allows for Increased Workplace Monitoring*

- Although employees have the right to be free from unreasonable search and seizure under the Fourth Amendment, the protection only applies when the situation warrants a reasonable expectation of privacy. Public employers have the right to audit an employee's electronic text and email communications when made on an employer-provided device, and the search is motivated by a legitimate work-related purpose. City of Orlando v. Quon, 130 S. Ct. 2619 (2010)

    - In 2009, DOJ's Office of Legal Counsel (OLC) issued written guidance concluding "that the adoption, implementation, and enforcement of model log-on banners or model computer-user agreements eliminates federal employees' reasonable expectation of privacy in their uses of government-owned information systems with respect to the lawful government purpose of protecting federal systems against intrusions and exploitations." Therefore, an agency is in compliance with the Fourth Amendment so long as it "consistently adopts, implements, and enforces the model log-on banner or model computer-user agreements." Since 2009, and for many years prior, all agencies have been utilizing such banners and agreements.

3. *Despite Limited Protections Against Workplace Monitoring, Federal Employees Enjoy Significant Protections from the Release of PII*

There are two primary sources of statutory protection from the illegal disclosure of personnel information:

- The Privacy Act, 5 USC § 552a provides that "no Agency shall disclose any record which is contained in a system of records by any means of communication to any person... except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains..." 5 U.S.C. § 552a(b).
    - There are exceptions to this requirement for certain "permitted disclosures," to include wherein the disclosure is made for a legitimate internal business function or routine use. An agency's violation of the Privacy Act can result in civil penalty, including no less than $1,000 in actual damages and attorney fees, where an agency "fails to comply with... this section or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual." 5 U.S.C. § 552a(g)(1)(D) and (g)(4)(A)-(B).

- The Americans with Disabilities Act (ADA), the Rehabilitation Act (RA), and implementing EOC regulations, provide that agencies are required to keep confidential all information relating to a federal employee's medical condition or history. *See* 29 CFR § 1630.14 (c)(1).
    - Specifically, the regulations hold that while an agency may require medical examinations and/or inquiries into the abilities of an employee to perform job-related functions, the information obtained during such inquiries "shall be collected and maintained on separate forms and in separate medical files and be treated as confidential medical record." Id. at 1630.14(c)(1). The regulations only authorize release of information in limited situations, including where "supervisors and managers may be informed regarding necessary accommodations." Id. at 1630.14(c)(1)(i). The EEOC has also held that 29 CFR § 1630.14 extends to an employee's request for reasonable accommodation under the ADA, Price v. Postal Service, EEOC Doc 0120070997 (May 22, 2008) and requests for sick leave under Family Medical Leave Act, Seachrist v. Postal Service, EEOC Doc. 0120065327 (June 27, 2008); Shaw v. Department of Transportation, EEOC Doc. 01A30273 (March 11, 2004)

Additionally, through its long-standing enforcement guidance, the EEOC has held:

> "Employers must keep all information concerning the medical condition or history of its applicants or employees, including information about psychiatric disability, confidential under the ADA. This includes medical information that an individual voluntarily tells his/her employer. Employers must collect and maintain such information on separate forms and in separate medical files, apart from the usual personnel files." *See* EEOC

Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, March 25, 2007, Question 15, *cited by* Price, *supra.*

It is important to note that the previously mentioned confidentiality protections apply to all employees and are not limited exclusively to those with disabilities. Hampton v. Postal Service, EEOC Appeal No. 01A00123 (April 13, 2000). The EEOC has also held that a violation of 29 CFR § 1630.14 constitutes a violation of the Rehabilitation Act and carries the normal remedies associated with a finding of discrimination against an agency, including an award of compensatory damages and attorney fees.