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EMPLOYEE SURVEILLANCE: LEGAL ISSUES WHICH SHOULD BE CONSIDERED

While surveillance cameras are widely used in schools to promote safety and protect school property, the use of video cameras to record school employees triggers a number of complex legal issues, including Fourth Amendment privacy concerns, state and federal eavesdropping and wiretapping laws, the Family Educational Rights and Privacy Act (FERPA), the Education Code, and the Educational Employment Relations Act (EERA).

Fourth Amendment Privacy Expectations:

Employees who challenge the use of video equipment to record their conduct in the workplace may claim that the surveillance violates their right to be free from unreasonable searches under the Fourth Amendment. In determining whether Fourth Amendment rights have been violated, the US Supreme Court has held:

A defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one which has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.¹

In other words, whether the Fourth Amendment will be triggered by an employer using video surveillance cameras to record employee conduct will depend on where the surveillance occurs and whether the employee's expectation of privacy is reasonable. For example, an employer's use of a hidden video camera in a break room for one week designed to "catch" a group of night time custodians taking lengthy unauthorized breaks while reporting they worked their full shifts was held reasonable and not in violation of the Fourth Amendment, particularly since the break room was open to all employees.² On the other hand, video surveillance of a locker room/office to catch a physical education teacher who administrators believe was engaged in theft from the boys' locker room was found to violate the Fourth Amendment in an action brought by several of the other teachers who used that office.³

California's Constitution also guarantees the right to privacy. Investigation or videotaping may, however, fall within the provisions of Government Code 821.6 and thus be immune from

¹ *Minnesota v. Carter*, 525 U.S. 83 (1998)

² *Brannen v. Board of Education, Kings Local Sch. Dist.*, 516 F.3d 489 (6th Cir. 2008)

³ *Helisek v. Dearborn Pub. Sch.*, 2008 U.S Dist. LEXIS 25514 (E.D. Mich. 2008)

suit if performed for the benefit of the district.⁴

State and Federal Eavesdropping and Wiretapping Laws

In California, it is a crime to use an electronic device to record a private conversation.⁵ To be a crime, eavesdropping must be: (1) intentional; (2) without the consent of *all* parties to the conversation; (3) where the conversation is *confidential* (at least one of the parties to the conversation intends that no one else overhear it); and (4) with the use of an electronic amplifying or recording device. In addition to fines, penalties and civil remedies for illegal eavesdropping, any evidence gathered as a result of the recording generally cannot be used in legal proceedings.

Title I of the Federal Electronic Communications Privacy Act of 1986 prohibits intentional interception of any wire, oral or electronic communication.⁶ Oral communication is defined as “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.”

Education Code 49060 et seq. and FERPA

Surveillance cameras which capture students raise issues under the Education Code and the Family Educational Rights and Privacy Act (FERPA).⁷ In general, districts are prohibited from disclosing personally identifiable information from students’ education records without the consent of a parent or eligible student, unless an exception applies. In this area of concern, the release of surveillance video will hinge on: (1) whether the videotape is an “educational record” for the students who appear on the video recording; (2) whether the videotape falls within an exception (i.e., law enforcement exception); or (3) whether the videotape is “maintained” by the district.

Education Code 51512 Requires Teacher and Principal Consent

The use by any person, including a student, of any electronic listening or recording device in a classroom is prohibited without the prior consent of the teacher and the principal of the school. Such conduct is deemed disruptive to the teaching process and is a misdemeanor for willful violators for those other than a pupil, who may be subject to appropriate discipline.

Collective Bargaining Concerns

School districts, as employers, may use hidden surveillance cameras to “catch” employees believed to be engaged in workplace misconduct prior to taking disciplinary action. Video evidence of employee misconduct is generally irrefutable and can lead to helpful admissions. However, in order to avoid an unfair labor practice charge or employee grievance, districts should

⁴ *Richardson-Tunnell v. School Insurance Program for Employees (SIPE)*, 157 Cal.App.4th 1056 (2007)

⁵ California Penal Code 632.

⁶ 18 U.S.C. 2510

⁷ California Education Code 49060 et seq. and 20 U.S.C. 1232g (FERPA).

ensure that they have complied with collective bargaining obligations under the Educational Employment Relations Act (EERA).⁸

While no specific California decisions were found by the Public Employment Relations Board (PERB), the National Labor Relations Board (NLRB), to which PERB will refer, has addressed the issue of hidden surveillance of employees, finding that use of such cameras constitutes a mandatory subject of bargaining.⁹ The use of surveillance cameras was compared by the NLRB to other subjects of mandatory bargaining such as physical examinations, drug and alcohol testing, and polygraph testing due to their shared purpose as “investigatory tools.” The NLRB has not required, however, that the employer apprise the union of each instance when surveillance cameras would be used, the location of the cameras, or the times the cameras would be in use. The employer is typically only required to bargain over the general requirements for the use of hidden surveillance cameras, such as: (1) whether the cameras may ever be used; (2) where the cameras may be used; (3) whether the employer would be required to demonstrate reasonable suspicion of misconduct prior to using the cameras; and (4) whether the video recordings may be used in disciplinary proceedings.¹⁰ By addressing these issues with the union, the employer can still preserve the benefits of hidden video surveillance while also involving the union in developing the terms and conditions of their members’ employment.

Conclusion

The use of video surveillance cameras in public schools is becoming increasingly more prevalent. With their use, however, come a host of issues, particularly the reasonable expectations of privacy of those recorded. In balancing these interests, surveillance cameras should only be used in those areas where people would not reasonably expect privacy (public hallways, walkways, front offices, parking lots, cafeterias, etc.), after prior notification is provided to staff, students, parents and other members of the public (signs, board policies and handbooks), and after the development of established procedures for camera set up, monitoring and viewing of the video recordings. The employer should also have a legitimate governmental interest for the surveillance (i.e., safety, student well-being and other matters of school operation) sufficient to overcome any invasion of privacy challenge.

If you have any questions concerning this issue, please do not hesitate to contact our office.

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⁸ California Government Code 3540 et seq.

⁹ *Colgate-Palmolive Co.*, 323 NLRB 515 (1997)

¹⁰ *Brewers and Malts, Local Union #6 v. Anheuser-Busch*, 414 F.3d 36 (D.C. Cir. 2005)