

CALIFORNIA

EMPLOYMENT LAW LETTER

Part of your California Employment Law Service



HRHero.com
A division of BLR®

CALIFORNIA LABOR CODE

Can you videotape your employees on the job?

by Kimberly M. Foster
Carothers DiSante & Freudenberger LLP

In response to an inquiry from a U.S. senator, the California attorney general (AG) released an opinion in February on the lawfulness of an employer's practice of videotaping its truck driving employees, allowing the videotapes to be inspected by a third party, and using the videotapes as grounds for imposing employee discipline and for training purposes. Is the employer guilty of a misdemeanor under the California Labor Code? No, says the AG.

Drivers taped for training, discipline purposes

The practice underlying the question posed by the senator is quite simple and widespread in the commercial and municipal transportation industry. Video cameras are installed in trucks and buses. The cameras record the actions of drivers on a continuous loop, overwriting previous footage unless there is a "triggering event," such as hard braking, swerving, or a collision.

When a "triggering event" occurs, the camera saves the footage, which is received by a system operator (the third party) and released to the driver's employer for training or discipline purposes. The video is also made available to the driver and his bargaining representative.

Law prohibits the collecting of photographs

The AG considered the following question: Does an employer violate Labor Code Section 1051 by requiring its drivers to submit to having their recorded images reviewed by a third party to the potential detriment of the driver, who may be disciplined for his driving conduct?

Section 1051 provides that "any person . . . who requires, as a condition precedent to securing or retaining employment, that an employee or applicant for employment be photographed or fingerprinted by any person" for the purpose of furnishing the information to a third party, to the detriment of the employee, is guilty of a misdemeanor. For purposes of analyzing the statute, the AG interpreted the term "photographed" to include the video recordings of an employee.

Legislative intent shows videotaping truck drivers is permissible

The AG reviewed the legislative history that led to the enactment of Section 1051 to answer the senator's question. Labor Code Section 1051 is rooted in an "anti-blacklisting law" enacted in 1913. Blacklisting laws were largely enacted between 1887 and 1930 because employers, in an effort to diminish collective bargaining, created and circulated lists of prounion workers to prevent them from gaining employment.

At the time the law was enacted, employers were requiring all of their employees to go to private detective agencies to have their fingerprints and photographs taken, with the understanding that no one would be employed in the particular trade or industry without being approved by a detective agency beforehand. Section 1051 was intended as a countermeasure to the antilabor conduct.

The AG considered the way in which Section 1051 has been applied in the past, including the exceptions that have been carved out to permit employee fingerprints and photographs to be taken in connection with criminal background checks for certain jobs, such as bankers, broker-dealers, and childcare providers. The AG ultimately concluded that the provision "does not stand as a universal or insuperable barrier to the use of photographs or fingerprints for ensuring safety in the workplace. Instead, although not entirely a dead letter, it may be fairly characterized as an outdated statute from which the legislature has often seen fit to part ways."

The AG further opined that since the photographs and video footage were being returned to the driver's own employer rather than a prospective employer, the employer's actions did not violate the plain terms of the statute. The AG characterized the systems operator as an agent of the employer, rather than a third party, because the process of videotaping and inspecting the recorded

images was for the sole benefit of the employer and the systems operator kept the footage confidential from all others.

Lastly, the AG considered recent amendments to the Motor Vehicle Code that permit the installation of video-recording devices in vehicles for the purpose of monitoring driver performance to improve safety as further evidence that the legislature did not intend to create a blanket rule prohibiting employers from videotaping their employees. *Opinion California Attorney General, No. 12-1101* (February 13, 2014).

Bottom line

Although the AG's opinion bolsters your right to videotape employees engaged in on-the-job conduct, you must be mindful to comply with other provisions of the Labor Code pertaining to surveillance in the workplace. For example, Section 435(a) prohibits employers from making audio or video recordings of employees in certain work areas considered to be private, such as restrooms or locker rooms.

The author can be reached at Carothers DiSante & Freudenberg LLP in Los Angeles, kfoster@cdflaborlaw.com. ♣