THINKING OUTSIDE THE BOX WITH AI: ADAPTING 20TH CENTURY LABOR AND EMPLOYMENT LAW TO 21ST CENTURY ALGORITHMS THAT SELECT, MONITOR, AND CONTROL EMPLOYEES

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INTRODUCTION

This Article examines two aspects of "the ever-evolving relationship"[1] between AI, automation, and labor and employment law: (1) the implications for employees' specific rights to privacy, equality, and dignity; and (2) protection of union organizing and other forms of employee collective activity.[2]

"As the cost of data collection and processing continues to fall, employers increasingly are able to deploy technology to monitor — and control — the workplace to a hitherto unimaginable degree."[3] This ubiquitous rise of technology throughout America's workplaces heralds a transformative era in the world of work. First was the marriage of mobile phones, fast internet connections, and dependable satellite navigation. This technology combined to produce a geographic diffusion of the workforce, blur the boundaries of when and where work takes place, and popularize email, texting, cell phones, and social media as the preferred means for employees to communicate with one another.[4] More recently, data-driven management systems rely on specialized software — artificial intelligence (AI) in general, and increasingly sophisticated machine learning algorithms in particular — to select, monitor, and even discipline the workforce.[5]

A transcending question, of course, is the future of work itself — whether a large portion of the population will be unable to acquire access to gainful employment once automation becomes even more pervasive, and robots and "smart" machines replace humans. Who will get the best jobs that are left, and who will be left behind to do the work that technology does not devour? Those are momentous questions that have

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[1] Horton Management Law, *AI and the Laws of the Workplace* (Jan. 13, 2024), https://hortonpllc.com/ai-and-the-laws-of-the-workplace/.

[2] Not discussed here are two other important categories of legal issues emerging from the introduction of workplace technology: (1) implications for wage theft — failure to compensate employees as required by state and federal wage and hour law; and (2) status and labor rights of employees engaged in platform-based work — such as in Uber, Amazon Mechanical Turk, and Instacart.

[3] Jeremias Adams-Prass, *What if Your Boss Was an Algorithm? Economic Incentives, Legal Challenges, and the Rise of Artificial Intelligence at Work*, 41 COMP. LAB. L. & POL'Y J. 123, 130 (2019).

[4] *See, e.g.*, David. H. Autor, *Wiring the Labor Market*, 15 J. ECON. PERSPS., 25-40 (2001).

[5] *See* sources cited in Part II *infra.*

spawned a great debate.[6] But, these questions are not the subject of this article.

For now, and for the foreseeable future, humans will routinely report for work. But as many millions already have discovered, employers' increasing reliance on data and algorithms "have profound consequences for wages, working conditions, race and gender equity, and worker power."[7] This reliance on algorithmic managerial decision-making has induced anxiety among workers from the entertainment industry in Hollywood to the meatpacking industry in the Midwest.[8] For example, AI precipitated a well-publicized labor fight where the Writers' Guild of America (WGA) and Screen Actors' Guild (SAG-AFTRA) needed to strike in order to reach an understanding with film studios on how AI "can support, not replace, their members' contributions."[9]

A growing body of state and local law and regulations plays an increasingly important role in resolving modern workplace issues that are shaped by data-driven management systems. But I focus here on federal labor law.[10] Specifically, I focus on the paradox that two venerable, but aging, mid-twentieth century federal labor laws — the 1935 National Labor Relations Act (NLRA) and Title VII of the 1964 Civil Rights Act (Title

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[6] *Id.* at 125-28 (evaluating competing predictions of the degree of technological unemployment likely to arise from the exponential growth of machine learning and artificial intelligence); Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 YALE L.J. 254, 295 (2018) (same).

[7] Annette Bernhardt et al., *Data and Algorithms at Work: The Case for Worker Technology Rights*, UC BERKELEY LABOR CENTER (Nov. 2021), https://laborcenter.berkeley.edu/data-and-algorithms-at-work/.

[8] Julian Lutz, *How Labor Unions Are Navigating AI, New America* (Mar. 13, 2024), https://www.newamerica.org/education-policy/edcentral/how-labor-unions-are-navigating-ai/.

[9] *Id.* ("The studios agreed that screenwriters can use AI in specific instances, and studios can use AI to supplement writers' works as long as the human writers receive a fair share of the gains added by the AI. Actors, meanwhile, now must give their consent before employers can scan their likenesses to digital replicants and pay them for their likenesses.").

[10] Workers are protected not just by federal labor law but also by federal fair dealing laws such as The Fair Credit Reporting Act (FCRA). For example, in October 2024 the Federal Financial Protection Bureau issued a policy guidance protecting workers from digital tracking and opaque decision-making systems. The policy states that companies using third-party reports — including dossiers and surveillance-based algorithmic scores about their workers — must follow FRCA rules, including (1) obtaining a worker's consent before purchasing these reports; (2) provide detailed information to workers regarding the content of the report if the report is used to take adverse action; (3) delete or correct information in the report if the worker shows that information is inaccurate or incomplete; and (4) not use the information in the report for any purpose other than worker evaluation. *See* CFPB, *CFPB Takes Action to Curb Unchecked Worker Surveillance* (Oct. 24, 2024), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-curb-unchecked-worker-surveillance/.

VII) — are being called upon to resolve twenty-first century conflicts generated by the introduction of AI into the workplace — employer data collection, electronic monitoring, and algorithmic management. Think of this as the digital workplace creating a generational legal divide. Federal administrative agencies and the courts are flush with cases requiring them to decide how, if at all, mid-twentieth century labor legislation is a suitable legal tool for resolving cutting-edge 2025 labor disputes. A dominant view among scholars, lawyers, and others is that federal law is not up to the challenge of addressing the workplace issues that AI presents. For example, one scholar's recent evaluation of the current adequacy of federal law to address AI workplace issues was that "there really [are] very few laws that govern[] what employers could and could not do. So, employers really ha[ve] quite a lot of leeway. In fact, federally, they have *carte blanche* in terms of what kind of surveillance they can perpetrate in a workplace."[11] This view, that the current content of workplace law is insufficient to resist employer introduction of AI, also is a widely-held view among non-specialists in labor and employment law.[12] The goal of this Article is to demonstrate that these conclusions are unfounded: they seriously underestimate the capacity of currently enacted federal labor and employment law to address and resolve workplace conflicts created by an employer's deployment of AI, robotics, and other automation at the workplace.

My thesis is double-edged. On the one hand, current federal workplace law and regulations can be clumsy tools for resolving some of these problems. Think, for example, of AI systems taking on supervisory roles and the extraordinary challenge of using current NLRA methodology to prove that machine learning algorithms that issue disciplinary notices disproportionately to union activists evidence antiunion animus violative of Section 8(a)(3) of the NLRA. And even if causation could be proved, who is responsible, the software vender, the employer customer purchasing and using the software, or both? The point is that resolution of some digital-based workplace conflicts might barely be within the reach of our existing regulatory regimes. Identifying such gaps in workplace law warrants close examination.

However, *and this is the core point of this Article*, more than is currently appreciated by most observers, existing workplace law is well-suited for resolving nearly all of the novel issues that data-driven

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[11] Interview by Justin Hendrix with Ifeoma Ajunwa, *Ifeoma Ajunwa on the Quantified Worker*, TECH QUALITY PRESS (July 23, 2023), https://www.techpolicy.press/ifeoma-ajunwa-on-the-quantified-worker/ [hereinafter *Ifeoma Ajunwa on the Quantified Worker*].

[12] *See, e.g.*, *Can Unions Sue Corporations for Replacing the Workers with AI, Automation, and Outsourcing?*, REDDIT (2023), https://www.reddit.com/r/labor/comments/16pq8gz/can_unions_sue_corporations_for_replacing_the/ (expounding the view that "[u]nless there is a provision in a collective bargaining agreement which precludes an employer from controlling staffing, production, scheduling, etc. the union cannot seek a legal remedy").

employee surveillance and management systems spawn. But that suitability requires exploiting the creative potential of existing legal principles and precedent. This Article demonstrates that an innovative interpretive process is needed, and has begun. Creative applications are available to adapt sixty- to ninety-year-old labor legislation to resolve the modern legal issues that increased use of AI, automaton, and machine learning management systems at the workplace create. Whether we realize it or not, we are witnessing the opening scenes of cutting-edge applications of core principles of workplace law, as the following pages explain.

I. WORKPLACE DIGITAL TECHNOLOGIES: A MARRIAGE OF DATA INPUTS AND PREDICTIVE ALGORITHMIC OUTPUTS

Artificial Intelligence (AI) has been defined as a "machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments."[13] Employers increasingly are using a wide range of AI technologies that "gather [input data] and transform [it] into outputs such as rankings, predictions, decisions, and machine-based actions."[14]

AI programs rely on computer analysis of data to make a wide variety of employment decisions.[15] AI is used in automated hiring systems. The

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[13] National Artificial Intelligence Initiative Act, 15 U.S.C. § 9401(3) (2020).

[14] Bernhardt et al*., supra* note 7, at n.1. *See* Charlotte Garden, *Labor Organizing in the Age of Surveillance*, 63 ST. LOUIS U. L.J. 55, 56-57 (2018) (reporting that in "a 2007 survey by the American Management Association and the ePolicy Institute, two-thirds of the 304 employer respondents stated that they monitored their employees' use of the Internet, . . . that nearly half of respondents used keystroke loggers and reviewed their employees' computer files [and], when compared to earlier versions of the same survey, this study suggests that employer surveillance is on the rise").

[15] The following discussion of inputs used by algorithms regarding workers' habits, behaviors, and attitude and how employers use the resulting outputs to impact workers is drawn from findings reported at Robert Sprague, *Privacy Self-Management: A Strategy to Protect Worker Privacy from Excessive Employer Surveillance in Light Of Scant Legal Protections*, 60 AM. BUS. L.J. 793 (2023); EEOC, *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees* (May 12, 2022), https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence; Jennifer A. Abruzzo, *Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights*, NLRB, Office of the Gen. Couns. (Memorandum GC 23-02) (Oct. 31, 2022), https://www.nlrb.gov/guidance/memos-research/general-counsel-memos; Bernhardt et al., *supra* note 7; Tammy Katsabian, *The Rule of Technology: How Technology Is Used to Disturb Basic Labor Law Protections*, 25 LEWIS & CLARK L. REV. 895, 910-11 (2021); 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, 16-22 (2020); Garden, *supra* note 15, at 56-57.

proto automated hiring system used resume scanners that prioritize applications using certain keywords. The latest development in automated hiring is the automated video interview. Applicants whose resumes pass the initial screening are invited to interview before a camera screen with no human participating. Questions appear on the screen and the applicant answers orally within a set time limit allocated for each answer. For efficiency reasons, it is the AI that reviews the video and scores applicants based on a parsing of body language, vocabulary choices, tone of voice, and speech inflections. False negatives abound. For example, one system had trouble with southern accents, penalizing talented men and women from the south by interpreting a southern accent as a marker for those who lack confidence or are unsure of themselves. Parsing facial expressions such as looking away from the camera or lip tightening to identify characteristics such as veracity, telling the truth, or trustworthiness is a particularly problematic method of making estimates about character.[16] Some interviews are conducted electronically using "chatbots" that ask job candidates about their qualifications and reject those failing to satisfy predefined requirements. Testing software provides "job fit" scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived "cultural fit."

Much input data about workers is gathered by AI monitoring software at the workplace. This software is able to create live view (and playback) of video and audio files of employees, or it can create logs of computer keystrokes and capture screenshots. It can be run with or without an employee's knowledge.

The advent of wearable technology offers employers with second-by-second updates on workers' locations and activities.[17] Wearable badges with Bluetooth and infrared sensors can monitor employees' location in the building and an accelerometer can record when they move. Technology can capture in real time not only an employee's location in the building but also coworkers interacted with, bathroom use, and even a pause in an employee's movement. In addition to requiring wearable sensors such as wristbands, some employers install closed-circuit cameras and embed sensors in workplace equipment to efficiently capture workers' activities and locations as well as persons with whom a worker communicates at the workplace. Employers also monitor employees' locations while out in the field through use of GPS technologies located in vehicles or in workers' smartphones.

Technology also makes it possible for employers to retain third parties to mine the internet to uncover past information about an employee such

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[16] *See* discussion about video interviewing at *Ifeoma Ajunwa on the Quantified Worker*, *supra* note 11.

[17] *See* discussion of wearables at Rachel Aleks, Michael Maffie & Tina Saksida, *Reimagining the Governance of Work and Employment: The Role of Collective Bargaining in the Digitized Workplace,* LAB. & EMP. RELS. ASS'N (edited by Dionne Pohler) (2020), 92-93.

as summaries of social media accounts to identify participation in past union organizing efforts, credit reports, driving history, and criminal background checks. Employees can be required to wear sensors to collect personal biometric and health information, or wear worker radio-frequency identification badges or badges that embed microphones. Employers can even monitor employees outside the workplace including activities unrelated to the employee's work. Location during private time can be tracked, as can workers' activity on their Facebook pages.

Employers use this input data about workers and their behaviors to make algorithmic predictions to assist in making a wide variety of employment decisions. Some uses further legitimate business goals such as increasing productivity and reducing costs by optimizing employee performance, improving product quality, promoting safety, increasing objectivity, or decreasing bias.[18] Some uses of input data are disquieting, however. As part of an employer's recruitment, screening and hiring efforts, "flight risk" algorithms attempt to predict whether applicants, if hired, will quit. Other algorithms predict which job candidates will become pregnant or are likely to be a whistleblower. There are reports that companies employ union avoidance consultants who rely on surveillance technologies to identify workers who have engaged in, or are currently engaging in, union organizing. Predictive algorithms using data obtained from monitoring workers' social media practices and personality tests identify and screen out applicants who are likely to engage in worker organizing activities. In addition, algorithmic management systems use productivity metrics and customer ratings to rate employee performance, sometimes with discriminatory results harming racial minorities. Algorithms make promotion, demotion, retention, and dismissal decisions. The above is just a sampling of how data-driven employee management systems have implications for workers. Some of these implications are pernicious.

II. IMPLICATIONS OF AI AND MACHINE LEARNING ALGORITHMS FOR THE LAW PROTECTING EMPLOYEES' RIGHTS TO PRIVACY, EQUALITY, AND DIGNITY

Derek Mobley brought an employment discrimination action in federal district court naming as defendant the software company, Workday, Inc. [19] Mobley alleged that Workday, Inc., provided employers with algorithmic applicant screening tools that discriminated against him (and others similarly situated) based on race, disability, and age. Mobley alleged

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[18] *See* EEOC, *Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964* (May 18, 2023), https://www.eeoc.gov/laws/guidance/select-issues-assessing-adverse-impact-software-algorithms-and-artificial#ednref14.

[19] Mobley v. Workday, Inc., 740 F. Supp. 3d 796, 801-803 (N.D. Cal. 2024) (the recitation of facts below are based on findings found in the district court's opinion).

that, as an African-American man over the age of forty with anxiety and depression, he applied for over 100 positions with companies that use Workday's screening tools for talent acquisition and hiring and received not a single job offer.

Workday allegedly provided business clients operating in many different industries "human resource management services," including applicant screening services. Among these services, Workday allegedly provides its customers with a platform on the customer's website to collect, process, and screen job applications. Workday "embeds artificial intelligence ('AI') and machine learning ('ML') into its algorithmic decision-making tools that allegedly analyze and interpret resumes and applications and then dictate whether applicants are referred to — and thus considered by — employers." In short, the allegation is that Workday systems made automated decisions on behalf of employers to either reject the candidate or refer the candidate to an employer for further consideration. The Workday platform was the exclusive point of entry for many job opportunities. According to Mobley, these tools, which "determine whether an employer should accept or reject an application" are designed in a manner that reflects cultural biases and relies on biased training data.

Hiring software can be programmed to intentionally screen out applicants based on protected characteristics such as race, gender, religion, age, disability, etc. In 2023, the EEOC entered into a settlement with iTutorGroup, ending litigation that entailed EEOC allegations that "iTutorGroup programmed their [hiring] software to automatically reject female applicants aged 55 or older and male applicants aged 60 or older [resulting in] iTutorGroup reject[ing] more than 200 qualified applicants . . . because of their age."[20]

More commonly, hiring software that screens out persons in protected classes, as alleged, for example, in Mobley's lawsuit, results from what is referred to as AI Bias. AI Bias, also known as machine learning bias or algorithm bias, "refers to AI systems that produce biased results that reflect and perpetuate human biases within a society, including historical and current social inequality. Bias can be found in the initial training data, the algorithm, or the predictions the algorithm produces."[21]

Training Data: AI systems use training data to learn to make decisions and this training data may contain bias by over- or underrepresenting groups within the training data. A classic example would be security data that includes information gathered in predominantly black geographic

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[20] *See* discussion at Press Release, EEOC, *iTutorGroup to Pay $365,000 to Settle EEOC Discriminatory Hiring Suit* (Sept. 11, 2023), https://www.eeoc.gov/newsroom/itutorgroup-pay-365000-settle-eeoc-discriminatory-hiring-suit.

[21] IBM Data & AI Team, *Shedding Light on AI Bias with Real World Examples*, IBM ARTIFICIAL INTELLIGENCE BLOG (Oct. 16, 2023), https://www.ibm.com/blog/shedding-light-on-ai-bias-with-real-world-examples/.

areas that create racial bias in AI tools used by police.[22] The most well-publicized example of AI bias at the workplace is Amazon's decision in 2018 to discontinue use of applicant screening software that discriminated against women applying for technical jobs. Trained on a dataset that overrepresented men, the algorithm preferred applicants whose resumes used words more likely used by males, such as "executed" or "captured."[23]

Algorithmic and Cognitive Bias: Bias also can result from programming errors such as a programmer weighing factors in such a way that outcomes are skewed due to the programmers' own cultural biases such as programming an algorithm to make predictions based on income or vocabulary and unintentionally discriminating against persons of certain races or genders. Or "cognitive bias could lead to favoring data sets from Americans rather than sampling from a range of populations around the globe."[24] It is now widely understood that "human and systemic institutional and societal factors are significant sources of AI bias . . . and are [often] currently overlooked. Successfully meeting this challenge will require taking all forms of bias into account. This means expanding our perspective beyond the machine learning . . . to recognize and investigate how this technology is . . . created."[25]

Mobley alleged Workday screens applicants using discriminatory algorithmic tools in violation, *inter alia*, of Title VII of the Civil Rights Act of 1964 ("Title VII"),[26] the Age Discrimination in Employment Act of 1967 ("ADEA"),[27] and the ADA Amendments Act of 2008 ("ADA").[28] To resist a motion to dismiss, the "factual allegations [in the complaint] 'must . . . suggest that the claim has at least a plausible chance of success.'"[29] In litigation alleging screening discrimination by a software vender, the plaintiff must be able to show the plausibility of being able to prove two things: that the defendant is a covered entity under the laws

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[22] *Id.*

[23] Lena Kempe, *Navigating the AI Employment Bias Maze: Legal Compliance Guidelines and Strategies*, ABA BUSINESS LAW TODAY (Apr. 10, 2024), https://www.americanbar.org/groups/business_law/resources/business-law-today/2024-april/navigating-ai-employment-bias-maze/.

[24] IBM Data & AI Team, *supra* note 21.

[25] Reva Schwartz et al., *Towards a Standard for Identifying and Managing Bias in Artificial Intelligence,* NAT'L INST. OF STANDARDS & TECH. SPECIAL PUBL'N 1270, at i, 34, https://doi.org/10.6028/NIST.SP.1270 ("More work needs to be done to understand the complex institutional and societal structures where these systems are developed and placed. Humans carry their own significant cognitive biases . . . into the operation of AI systems.").

[26] 42 U.S.C. § 2000e et seq.

[27] 29 U.S.C. § 621 et seq.

[28] 42 U.S.C. § 12101 et seq.

[29] In re Century Aluminum Co. Sec. Litig., 729 F.3d 1104, 1107 (9th Cir. 2013) (referring to Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)); *see also* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007).

allegedly violated and that defendant engaged in acts that contravene the federal antidiscrimination laws.

A. Plausibility of Showing that a Software Vender Is a Covered Entity under Federal Antidiscrimination Legislation

Workday was not literally Mobley's employer, and Workday moved to dismiss on the ground that as a software vendor, it is not a covered entity under the applicable antidiscrimination statutes. The statutes Mobley relied on were enacted before there was AI, or at least before AI had entered the workplace as a managerial tool. In other words, Congress could not have considered whether federal fair employment laws cover a software vender who designs algorithmic management tools that discriminate.

These statutes do include an "employment agency" as a covered entity but Title VII, the ADA and the ADEA all limit "employment agency" to persons who either *procure* employees for an employer or who *procure* for employees opportunities to work for an employer.[30] Software venders such as Workday do not bring job listings to the attention of those looking for employment. They create a platform on a client's website to capture data from job applicants seeking employment who have independently contacted the client. The EEOC takes the position that an employment agency "need not actively solicit the prospective employees or job applicants; it is enough if applicants come to them."[31] Some lower courts agree.[32] The district court in the *Mobley* litigation disagreed, holding that the act of screening applicants who independently contact a client's website does not qualify an entity as an employment agency.[33]

The antidiscrimination laws that Mobley relied on list as covered entities not just employers themselves but also agents of those employers. Courts have held that an employer's agent may be independently liable when the employer has delegated to the agent "functions [that] are traditionally exercised by an employer."[34] This concept of agency liability

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[30] *See, e.g.*, 42 U.S.C. §§ 12111(7), 2000e(c).

[31] U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1990-7, COMPLIANCE MANUAL: CM-631; EMPLOYMENT AGENCIES (1990), https://www.eeoc.gov/laws/guidance/cm-631-employment-agencies ("Procuring employees . . . entails securing prospective employees . . . for an employer. [The] employment agency need not actively solicit the prospective employees or job applicants; it is enough if applicants come to them.").

[32] *See* Dumas v. Town of Mount Vernon, 436 F.Supp. 866 (S.D. Ala. 1977), *aff'd in relevant part, rev'd in part*, 612 F.2d 974 (5th Cir. 1980).

[33] Mobley v. Workday, Inc., 740 F.Supp.3d 796, 808 (N.D. Cal. 2024).

[34] Williams v. City of Montgomery, 742 F.2d 586, 589 (11th Cir. 1984) (per curiam). *See also* DeVito v. Chicago Park Dist., 83 F.3d 878, 882 (7th Cir. 1996); Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, 37 F.3d 12, 17 (1st Cir. 1994); *and see* Raines v. U.S. Healthworks Med. Grp., 534 P.3d 40, 51 (Cal. 2023) ("These cases establish that an employer's agent can, under certain circumstances, appropriately bear direct liability under the federal

under the federal antidiscrimination statutes that holds agents independently liable for their acts of discrimination is subject to dispute in the federal courts and has not been considered by the Supreme Court. The inclusion of an "agent" as a covered entity in the antidiscrimination statutes might establish only that employers are liable for the acts of their agents and not that agents are separately liable themselves for functions performed on behalf of employers.[35] In Mobley's case, the district court held that Workday, a software vender that acts as the agent for covered employees by performing hiring functions traditionally exercised by an employer, is independently liable for its acts that contravene the federal antidiscrimination laws. This holding relies on pre-AI precedent that did not involve software venders. But holding software venders independently liable has important pragmatic implications. As the district court judge in the *Mobley* litigation explained, "Without agency liability, it appears that no party would be liable for intentional discrimination in [a] scenario [where the software vender knows, but the client does not know, that the algorithms discriminate, for example, on the basis of race]."[36]

The scope of agency liability of a software vender under the antidiscrimination laws is an unsettled question. The district court's opinion in the *Mobley* litigation that applied independent agent liability to a software vender was a ground-breaking and innovative application of the federal antidiscrimination laws. The question of a software vender's liability under the antidiscrimination laws will remain uncertain until enough courts of appeals weigh in. In the mid-twentieth century when these antidiscrimination laws were enacted, Congress hardly could have contemplated whether an AI software vender is a covered person. But a half century later the issue is front and center in antidiscrimination litigation. Vender liability is a momentous issue. First, the venders are the only entities capable of conducting AI audits to rid the algorithms of AI bias. Moreover, if the vender is found to be liable, a court can remedy the discrimination by enjoining the vender's use of the software until the AI bias is removed. If the antidiscrimination laws are interpreted to provide that only the corporate clients can be sued, the individual corporate clients of AI venders can be enjoined from using the software prospectively, but the software vender is free to continue using the discriminatory software with other clients.

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antidiscrimination laws"); EEOC Compliance Manual § 2-III(B)(2)(b), https://www.eeoc.gov/laws/guidance/section-2-threshold-issues ("An entity that is an agent of a covered entity is liable for the discriminatory actions it takes on behalf of the covered entity").

[35] *See, e.g.*, Miller v. Maxwell's Intern. Inc., 991 F.2d 583 (9th Cir. 1993). In *Mobley*, Workday unsuccessfully argued that *Miller* supported this more limited view of agency under the antidiscrimination laws.

[36] *See Mobley*, 740 F.Supp.3d at 806.

B. Plausibility of Showing that the Deployment of AI Recruitment Algorithms Contravenes Antidiscrimination Law

Intentional discriminatory treatment is extraordinarily difficult to prove but the antidiscrimination laws provide an alternative. Antidiscrimination statutes permit recovery by proving disparate impact. "To plead a prima facie case of disparate impact [in a Title VII case], a plaintiff must '(1) show a significant disparate impact on a protected class or group; (2) identify the specific employment practices or selection criteria at issue; and (3) show a causal relationship between the challenged practices or criteria and the disparate impact.'"[37] A selection method has a significant disparate impact if it has the effect of disproportionately excluding persons within a protected class or group. A significant disparate impact can be established using statistical data. One statistical method is application of the EEOC's four-fifths rule.[38]

The four-fifths rule is a general rule of thumb for determining whether the "selection rate" for one group is substantially different than the selection rate of another group. The rule states that one rate is substantially different than another if their selection rate ratio is less than four-fifths (or eighty percent).

Step 1 is to identify each group's selection rate by computing a ratio of applicants in each group selected to the number of those candidates within that group who applied. So, if forty-eight white candidates were selected out of eighty white applicants, their selection rate would be sixty percent. And if twelve minority candidates were selected out of forty who applied, their selection rate would be thirty percent.

Step 2 is to compute a ratio of the selection rate of the protected group to the selection rate of the unprotected group. In the example above, the selection rate for minority applicants was thirty percent and for whites it was sixty percent. The ratio is 30:60 or fifty percent. Because fifty percent is lower than four-fifths (or eighty percent), the four-fifths rule states that the selection rate for minority applicants is substantially different than the selection rate for white applicants in this example, which would be evidence of disparate impact discrimination against minority applicants.

Proving liability based on disparate impact greatly expands the plaintiff's ability to plead "factual content that allows the court to draw the

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[37] Bolden-Hardge v. Off. of Cal. State Controller, 63 F.4th 1215, 1227 (9th Cir. 2023). Once a disparate impact is shown, the burden shifts to the employer to show that the process creating the impact is job-related and consistent with business necessity, and that there is no less discriminatory alternative available. *See* EEOC, *Select Issues*, *supra* note 18.

[38] *Id.*; 29 C.F.R. §§ 1607.4(D), 1607.16(B) (2024). The four-fifths rule provides that "if the selection rate of individuals of a particular race, color, religion, sex, or national origin . . . is less than 80 percent of the rate of the non-protected group, then the selection process could be found to have a disparate impact in violation of Title VII, unless the employer can show that such use is 'job related and consistent with business necessity[.]'" Kempe, *supra* note 23.

reasonable inference that the defendant is liable for the misconduct alleged [under the antidiscrimination laws]."[39] But, a disparate impact plaintiff typically "lacks pre-discovery access to information about the actual impact of the challenged policy."[40] This reality raises the crucial issue of whether a disparate impact plaintiff may prevail at the pleading stage by relying on publicly available reports and studies providing proof of real-world conditions, which, taken as true for pleading purposes, reasonably lead to the inference that the challenged policy would cause a disparate impact? Or, at the pleading stage, must a disparate impact plaintiff plead data showing the actual adverse impact of the employment policy she challenges and data showing that the challenged policy caused the adverse impact in her case?

The answer to this question is likely to be outcome determinative in Title VII AI litigation involving screening algorithms. When alleging that algorithmic predictions disparately impact protected classes (for example in selecting which applicants to hire or employees to discipline), few plaintiffs will be able to survive a motion to dismiss if required to plead evidence showing the challenged policy's actual discriminatory impact. The employer controls the data demonstrating the disparate impact and controls the information that explains whether the software algorithms have been programmed in such a way that they produced predictions that have a disparate impact. Without discovery, a private plaintiff will seldom, if ever, have access to "data" concerning actual conditions at the place of employment and whether algorithms caused these conditions. The Supreme Court has not addressed a plaintiff's pleading obligations in AI disparate impact litigation, and the circuit courts of appeals are divided on the question.[41] The pleading specificity that disparate impact plaintiffs in AI cases must satisfy will have a major impact on plaintiffs' ability to prevail and thus will determine whether plaintiffs will bring actions challenging AI based selection systems and discipline policies.

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[39] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

[40] Brief for EEOC as Amicus Curiae Supporting Appellant, Liu v. Uber Technologies, Inc., 2024 WL 3102801 (9th Cir. 2024) (Nos. 22-16507, 22-16712), 2023 WL 2898556, at 13.

[41] *Compare* Liu v. Uber Technologies, Inc., Nos. 22-16507, 22-16712, 2024 WL 3102801 (9th Cir. 2024) (affirming that plaintiff failed to state a claim when pleadings did not include data demonstrating that driver termination decisions based on customer rating of drivers had a discriminatory impact on Uber's non-white drivers) *with* Carson v. Lacy, 856 Fed. App'x 53, 54 (8th Cir. 2021) (finding that the district court should not have required the disparate-impact plaintiff to "allege [the defendant employer] had disproportionately fewer black custodians as a result of using felony background checks"). *See also* Brief for EEOC as Amicus Curiae Supporting Appellant, *supra* note 40, at 12 (charging that the Ninth Circuit panel's treatment of Appellant's social-science research allegations is in conflict with both Circuit precedent and precedent from other circuits, thereby threatening to undermine Title VII's antidiscrimination goals).

III. AI INTERFERENCE WITH THE RIGHT OF SELF-ORGANIZATION: UNION ORGANIZING AND OTHER FORMS OF EMPLOYEE COLLECTIVE ACTIVITY

A. Software Vender Coverage under the NLRA

The *Mobley* litigation, discussed above, addressed the important question of agent liability under Title VII. Agent liability also is an issue that arises under the NLRA. What if, for example, Workday, the defendant in the *Mobley* litigation, had provided algorithms that screened out from hiring eligibility those who had in the past engaged in union organizing or those that the algorithms predicted were most likely to engage in union organizing if hired? It is unlawful under the NLRA to refuse to hire because, once hired, an applicant intends to engage in NLRA protected activities such as union organizing.[42] But similar to the coverage issue in the *Mobley* litigation, it is not entirely clear whether a software vender can be liable under the NLRA for providing software having an antiunion discriminatory effect. The NLRA states that it is an "unfair labor practice for an employer" to interfere with employees' protected concerted activities.[43] NLRA Section 2(2) defines "employer" to include any person acting as an agent of an employer.[44] A software vender given authority to make screening decisions for a client would be an agent of an employer under the NLRA.[45] But, does the concept of agency liability under the NLRA hold agents independently liable for their acts of discrimination, or does the NLRA's reference to agents establish only that employers are liable for the acts of their agents and not that agents are separately liable themselves for functions that they perform for employers?

Early on, the NLRB held that a *labor relations consultant* employed by a manufacturing company is an employer under NLRA definition since it was acting as an agent for the company and thus liable for its own unfair labor practice conduct.[46] Consistently, the NLRB and the Courts have read NLRA Section 2(2) literally to hold that if a client satisfies the statutory

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[42] NLRB. v. Town & Country Elec., Inc. 516 U.S. 85 (1995) (finding it unlawful to discriminate against an applicant who, if hired, would also be paid by a union to help organize the company); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 185-87 (1941) (holding that an employer may not discriminate against an applicant on the basis of union status).

[43] 29 U.S.C. § 158(a).

[44] 29 U.S.C. § 152(2).

[45] Section 2(13) of the NLRA adopts the common law view that one is an agent if given actual or apparent authority to perform a function normally performed by the principal. 29 U.S.C. § 152(13).

[46] National Lime & Stone Co., 62 N.L.R.B. 282, 308 (1945) (ordering consultant acting as an agent of the employer to cease and desist from interfering with the NLRA rights of the employer's employees); Note, *The Liability of Labor Relations Consultants for Advising Unfair Labor Practices*, 97 HARV. L. REV. 529 (1983).

requirements of an employer and thus falls within the Board's jurisdiction, any agent acting on behalf of the client, such as a labor consultant, is an employer subject to the Board's reach.[47] Applying this precedent involving labor consultants, if a software provider were to be named as a respondent in an unfair labor practice charge as an agent of an employer, the issue should be whether the NLRB has jurisdiction over the employer-client. If yes, then the NLRB also would have jurisdiction over the agent who would then be liable for its own unfair labor practice conduct.[48]

There are two complications with respect to this analysis that warrant attention. First, in one case, the NLRB assumed that the relevant commerce involvement was that of the consultant-agent and not that of the client.[49] When a software vendor has substantial involvement in interstate commerce, the two approaches could be regarded as alternative tests of jurisdiction, and then no choice between them would be necessary. However, a small or start-up software vender may have limited involvement in interstate commerce, or the NLRB might want to name a single computer programmer as a respondent in an unfair labor practice charge. In either case, confining analysis of commerce involvement to the agent's direct involvement in interstate commerce could have the consequence of excluding many unfair labor practices from the Board's jurisdiction because the agent may not itself be sufficiently engaged in interstate commerce to fall within the NLRB's jurisdiction.

The other consideration, which could become crucial in AI screening cases coming before the NLRB, arises from the principle that agents of NLRA employers are liable only for their own unfair labor practice conduct. The NLRB has held that "Employers' agents cannot be held liable for the acts of the Employer even if it was found that the Respondent [agent] had formulated and then counseled the Employer to implement a plan to [engage in unfair labor practice conduct]"[50]. If merely *counseling or advising* a client to violate the NLRA does not comprise unfair labor

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[47] Blankenship & Associates, Inc. v. N.L.R.B., 999 F.2d 248, 250 (7th Cir. 1993) ("Once [the client] was within the Board's jurisdictional reach, any agent of his who committed unfair labor practices on [the client's] behalf was within that reach as well, regardless of the agent's own [involvement in interstate] commerce); Chalk Metal Co., 197 N.L.R.B. 1133, 1148 (1972); NLRB v. Selvin, 527 F.2d 1273, 1277 (9th Cir. 1975). *See also* Douglas J. McDermott, *A. Board's Power to Issue Broad Remedial Measures Directed at Labor Consultants Who Have Not Been Officially Named in Previous Cases: Blankenship and Associates V. NLRB*, 35 B.C. L. REV. 421 (1994).

[48] In the alternative, a software vender who was an agent of an NLRA employer would also fall within the coverage of the NLRA on the theory that its own involvement in interstate commerce placed it within the legal jurisdiction of the NLRB. *See* Blankenship and Associates, Inc., 306 N.L.R.B. 994 (1992).

[49] St. Francis Hospital, 263 N.L.R.B. 834, 847 (1982), *enforced*, 729 F.2d 844 (D.C.Cir.1984) (assuming the relevant commerce was that of the agent).

[50] *See* Blankenship & Associates, 290 N.L.R.B. 557 (1988), *recons. denied*, 1989 WL 224111 (1989).

practice conduct by a consultant, even if the employer-client responds to the counseling and advising in a way that violates the NLRA, this creates a loophole that software venders may be able to exploit in AI screening cases involving worker rights under the NLRA. For example, what if in NLRA litigation a client does not authorize the software vender to deploy its algorithms as was the arrangement alleged in the *Mobley* litigation?[51] That is, what if the client contracts with the software vender to deploy algorithms merely to create output in the form of a printout that just "counsels and advises" the employer client with respect to which applicants should not be given additional consideration, with *the client* deciding which applicants qualify for further consideration? Under NLRB precedent, would not the software vender escape all NLRA liability on the theory that it had not itself taken over any employer function but merely had provided an opinion on a course of action? At least one NLRB member has concluded that a consultant violates the NLRA when he or she counsels a client to engage in unfair labor practice conduct and the "counseling . . . was heeded and acted on by [the client]."[52] But that is not current NLRB doctrine. Also consider that although a software vender's opinion provided to a client will most likely be deemed commercial speech as a matter of constitutional free speech doctrine, such an opinion may enjoy First Amendment protection.[53] As more software venders provide employers algorithmic predictions that allegedly discriminate against those who engage in protected NLRA activities, it will be necessary for courts and administrative agencies to evaluate very carefully when software venders are legally responsible for the resulting discrimination, a decision made more complicated if the vender only recommends a course of action.

B. Algorithmic Management Technologies that Violate NLRA Sections 8(a)(1) and 8(a)(3)

The NLRA contains two sections that remedy employer interference with employee rights protected by the NLRA (i.e., employees' right to self-organization).[54] Section 8(a)(1) proscribes employer interference, restraint, or coercion in the exercise of the right to self-organization. Section 8(a)(3) bans discrimination to encourage or discourage union membership, which includes participating in union organizing or other self-organization activities. The two sections have obvious overlaps. For example, antiunion discrimination banned by Section 8(a)(3) interferes with NLRA

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[51] Mobley v. Workday, Inc., 740 F.Supp.3d 796, 801-02 (2024).

[52] Blankenship & Associates, 290 N.L.R.B. 557, 559 (1988) (Member Johansen dissenting in part).

[53] *See* United States v. Spock, 416 F.2d 165, 179 (1st Cir. 1969) (citing *Bond v. Floyd*, 385 U.S. 116 (1966), for the proposition that "expressing one's view . . . is not foreclosed by knowledge of the consequences").

[54] The reference to employee rights protected by the NLRA includes union-related rights as well as any other concerted employee activities for mutual aid and protection. *See* 29 U.S.C. § 157.

protected rights and thus also constitutes a Section 8(a)(1) violation. But, and this will become increasingly important in NLRA litigation challenging use of algorithmic management technologies, Section 8(a)(1) independently bans employer conduct that does constitute an act of discrimination, and thus does not violate Section 8(a)(3), but nevertheless unlawfully interferes with NLRA protected employee rights. The classic example of such an "independent" Section 8(a)(1) violation is *Republic Aviation Corp. v. NLRB*,[55] a case that found unlawful a non-discriminatory, plant-wide no solicitation rule as applied to employee non-work time, such as employee lunch and break periods. Designing innovative and creative applications of NLRA precedent in AI cases will entail informed choices regarding whether the facts best support an allegation of a Section 8(a)(1) or a Section 8(a)(3) NLRA violation.

1. Section 8(a)(3) — Challenging Algorithmic Management Policies that Discriminate

Employer groups throughout the United States, mostly in the construction industry, have adopted hiring policies that result in excluding applicants who are most likely to support union organizing. These hiring methods have been the subject of unfair labor practice litigation. None of the litigation challenging these hiring policies considered the implications of AI because AI was not used as a management tool when these cases were litigated. But today, a data driven operating system easily could administer hiring policies that have the effect of discrimination against those who have engaged in past NLRA protected conduct.

It is clear that the NLRB is anticipating that soon it will receive unfair labor practice charges alleging AI screening discrimination. In 2022, the NLRB General Counsel directed the NLRB's regional offices to be on the alert for such charges and advised that "if employers rely on artificial intelligence 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."[56] A review of the pre-AI unfair labor practice cases involving hiring policies that discriminate against employees who have engaged in union organizing or other protected activities uncovers both challenges and opportunities for redressing antiunion discrimination caused by algorithmic-based selecting systems.

In *In re W.D.D.W. Commercial Systems & Investments, Inc.* (hereinafter *Aztech Electric*),[57] the employer CLP was a major supplier of construction trade labor to nonunion contractors in the western United States. CLP hired as many as several thousand employees annually. CLP implemented a new hiring guideline referred to as a wage comparability hiring rule. The

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[55] 324 U.S. 793 (1945).

[56] Abruzzo, *supra* note 15, at 5.

[57] 335 N.L.R.B. 260 (2001).

rule provided that: "Applicants whose most recent year of work experience is at a pay level more than 30% higher or lower than the starting wages paid on CLP assignments . . . must not be hired."[58] It was undisputed that implementation of the thirty-percent rule had the effect of excluding from eligibility for hire virtually all West Coast electrician applicants who had worked for any significant period of the preceding year on a construction project where their wages were determined by a union-negotiated contract. "Stated differently, the only real way to gain entry to CLP's work force is through prior employment with other nonunion employers."[59] This thirty-percent rule caused hundreds of applications to be rejected. Unions alleged that the rule violated NLRA Section 8(a)(3), which bans discrimination motivated by union animus. CLP asserted, and the NLRB agreed, that the rule was implemented to promote worker retention — the rule was implemented to exclude applicants who previously had earned higher wages and, thus, were less likely to continue to work for CLP in the long term. Since the NLRB found that the thirty-percent rule was motivated by a legitimate business justification, not union animus, no Section 8(a)(3) violation could be found based on extrinsic evidence of antiunion motivation.

Yet, in *Aztech Electric*, the NLRB found a violation of Section 8(a)(3), relying on the "inherently destructive" branch of proving a Section 8(a)(3) violation. In *Radio Officers' Union of Com. Telegraphers Union v. NLRB*,[60] the Supreme Court engaged in one of its most extensive discussions of how antiunion motive may be proved. The Court stated that, while the employer's purpose in discriminating is controlling, "specific evidence of [antiunion animus] is not an indispensable element of proof of violation of [Section] 8(a)(3)."[61] When employer conduct inherently encourages or discourages union membership, extrinsic proof of intent is unnecessary, for then intent can be presumed. In a series of cases in the mid-1960s, the Court elaborated on its *Radio Officers'* decision and the NLRB's authority to infer antiunion intent from employer conduct that speaks for itself because it is inherently destructive of rights protected by the NLRA.[62] This series of cases culminated in the Court's decision in *NLRB v. Great Dane Trailers, Inc*.[63]

In *Great Dane Trailers*, an employer stated an intent to pay striker replacements and non-striking employees vacation benefits that had accrued under an expired collective bargaining agreement but not to provide strikers the same benefits. There was inadequate extrinsic evidence that

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[58] *Id.* at 261.

[59] *Id.* at 263.

[60] 347 U.S.C. 17 (1954).

[61] *Id.* at 44.

[62] *See* Paul M. Secunda, *Politics Not as Usual: Inherently Destructive Conduct, Institutional Collegiality, and the National Labor Relations Board*, 32 FLA. ST. U. L. REV. 51, 61-72 (2004).

[63] 388 U.S. 26 (1967).

this decision was motivated by an anti-union intent, but the Court found a violation of Section 8(a)(3) nevertheless. The Court inferred an antiunion intent based on an analytical sequence that previous cases had hinted at but the Court honed in *Great Dane Trailers*. The Court explained that in some cases it can reasonably be concluded that the employer's discriminatory conduct is "inherently destructive" of important employee rights. In such cases, the Court held, "no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations."[64] But, even if the adverse effect on employee rights is "comparatively slight" (not inherently destructive), an antiunion motivation must be proved to sustain the charge *only if* the employer has first come forward with evidence of legitimate and substantial business justifications for the conduct.

In other words, whether the adverse effect of the employer's conduct on employees' NLRA rights is "inherently destructive" or "comparatively slight, " "*once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him*."[65] In *Great Dane Trailers*, a Section 8(a)(3) violation was found because the employer had engaged in discriminatory conduct which could have adversely affected employee rights to some extent and the employer "came forward with no evidence of legitimate motives for its discriminatory conduct . . . .The company simply did not meet [its] burden of proof."[66]

In *Aztech Electric*, the employer did proffer a business justification, so the *Great Dane Trailers* analytical sequence required NLRB to decide the seriousness of the adverse effect on employee rights. The NLRB held that the thirty-percent rule, which excluded from hiring consideration all who in the past year had worked under a collective bargaining agreement, was inherently destructive of employees' NLRA rights. The Board reasoned that, "even conduct that does not divide the work force based on participation in protected activities may be unlawful if it is inherently

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[64] *Id.* at 34. Later, in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 703 (1983), the Court added that in "inherently destructive" cases the NLRB was to balance employer business justification and adverse effect on employe rights, but "finding employer conduct to be inherently destructive has inevitably led to finding an unfair labor practice against the employer." Secunda, *supra* note 62, at n.117 (citing Brotherhood of Boilermakers, Local 88 v. NLRB, 858 F.2d 756, 762 n.2 (D.C. Cir. 1988) for the conclusion that "we are not aware of any case, however, in which either the Board or a court has found an employer's action to be inherently destructive of employee rights, and then, after balancing the interests at stake, has nevertheless found the conduct to be lawful under the Labor Act.").

[65] *Great Dane Trailers*, 388 U.S., at 34 (emphasis added).

[66] *Id.* at 34-35.

destructive of employee rights under the Act [because] it has 'the predictable and actual effect' of penalizing union supporters.'"[67]

It was at this point in its *Aztech Electric* decision that the NLRB majority made the first of two mistakes that resulted in the court of appeals refusing to enforce the decision. First, the NLRB gratuitously added that:

> [T]he Board's inherently destructive theory is analogous to the disparate impact theory long applied in cases prosecuted under Title VII of the Civil Rights Act of 1964. Under that theory, facially neutral employment policies that are "fair in form," . . . nonetheless may be deemed unlawful if they are "discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); *see, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (disparate impact on women of uniformly applied height and weight restrictions established a *prima facie* case of discrimination). If such a policy is discriminatory in operation, it becomes the employer's burden to justify adherence to the policy to forestall a finding that the policy was implemented and used "merely as a 'pretext' for discrimination."[68]

In denying enforcement of the NLRB's decision in *Aztech Electric*, the D.C. Circuit stated that "the Board may not draw support for its decision from the [Title VII] disparate impact line of cases" noting that the statutory language of the NLRA differs from the language in Title VII and the "[Supreme] Court has never imported [the Title VII disparate impact] concept into its cases interpreting § 8(a)(3) [and] [i]ndeed, the Court has been reluctant to extend the disparate impact theory to other laws prohibiting discrimination even where the statutory language bears greater resemblance."[69]

The second mistake that the NLRB made in drafting its *Aztech Electric* decision was finding that there was an "absence of evidence of antiunion motivation" rather than finding that there *was* evidence of antiunion motivation that one could infer from the inherently destructive effects of the thirty-percent rule.[70] In denying enforcement, the Court of Appeals took advantage of this mistake for it held that "the Supreme Court's longstanding interpretation of § 8(a)(3) is plainly at odds with the Board's reasoning in this case. Indispensable to a determination of a violation of § 8(a)(3) . . . is a finding that an employer acted out of an anti- (or 'pro-)

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[67] Lone Star Industries, 279 N.L.R.B. 550, 552-553 (1986), *enforced mem. in pertinent part sub nom*. Teamsters Locals 822 and 592 v. NLRB, 813 F.2d 472 (D.C. Cir. 1987).

[68] Aztech Electric, 335 NLRB at 262-63.

[69] Contractors' Labor Pool v. NLRB, 323 F.3d 1051, 1059-60 (D.C. Cir. 2003), *denying enforcement*, 335 N.L.R.B. 260 (2001).

[70] Aztech Electric, 335 N.L.R.B. at 262.

union motivation' [and] the Board certainly cannot conclude explicitly that petitioner's motivation is benign and then hold that its practice independently violates § 8(a)(3)."[71]

The NLRB's reasoning in *Aztech Electric* and its rejection by the Court of Appeals, combined with the above discussion of *Great Dane Trailers,* offer important lessons for upcoming litigation of AI cases involving antiunion discriminatory effects of algorithmic driven selection systems.

First, it is highly unlikely that a court will conclude that Title VII disparate impact doctrine is available to show antiunion motivation in a Section 8(a)(3) discrimination case. Adding a gratuitous reference to Title VII in the *Aztech Electric* case was an unforced error by the NLRB. It is immaterial whether the Board's *Aztech Electric* reasoning is "analogous to the disparate impact theory long applied in cases prosecuted under Title VII of the Civil Rights Act of 1964." Adding this observation was unnecessary and provided the Court of Appeals a basis to deny enforcement. Existing NLRB precedent had already established, without any reference to Title VII doctrine, that "even conduct that does not divide the work force based on participation in protected activities may be unlawful if it is inherently destructive of employee rights under the Act [because] it has 'the predictable and actual effect' of penalizing union supporters."[72]

The second lesson is that the NLRB is never relieved from proving antiunion motive in Section 8(a)(3) cases. Thus, it is inaccurate to argue that an employer engaged in inherently destructive conduct but had no antiunion motive. That sentence is analytically unsound. There may be no *extrinsic* evidence of antiunion motive, but the employer's inherently destructive conduct is itself evidence from which the NLRB and the courts can infer antiunion intent. That is a core teaching of both *Radio Officers' Union* and *Great Dane Trailers*.

An open question is whether a Court of Appeals today on the facts of *Aztech Electric* would enforce the NLRB decision if the decision made no reference to Title VII disparate impact doctrine. What if rather than finding an no antiunion motive, the Board held that the inherently destructive nature of the employer's thirty-percent rule was sufficient to infer an antiunion motive?

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[71] Contractors' Labor Pool v. NLRB, 323 F.3d at 300.

[72] Lone Star Industries, 279 N.L.R.B. 550, 552-553 (1986), *enforced mem. in pertinent part sub nom*. Teamsters Locals 822 and 592 v. NLRB, 813 F.2d 472 (D.C. Cir. 1987). *Accord* Moore Business Forms, Inc., 224 N.L.R.B. 393, 407-08 (1976), *enforced in pertinent part*, 574 F.2d 835 (5th Cir.1978) (pre-strike policy of rotating employees among three shifts changed post-strike to a policy of fixed shifts applied uniformly to all — replacements, crossovers and strikers — but new policy had a disproportionate detrimental effect on late cross-overs and full-term strikers who as a result of the new policy were permanently assigned to the less desirable shifts).

One difficulty when relying on the "inherently destructive" theory is that NLRB and judicial case law remain indeterminate with respect to which employer conduct is considered inherently destructive of employees' NLRA protected rights.[73] In 2015 the NLRB held that "[c]onduct is deemed to be 'inherently destructive' if it 'would inevitably . . . create visible and continuing obstacles to the future exercise of employee rights.'"[74] The Board has applied this "inherently destructive" standard, for example, where an employer discharged all employees of a particular craft because of their affiliation with and referral from a union.[75] If *ending* one's employment because of an employee's past union activity is inherently destructive because of its foreseeable effect on employees' willingness to engage in future union activities, then it is plausible that a court would agree with the NLRB that the *Aztech Electric* thirty-percent rule also is inherently destructive when its effect is to *deny hiring in the first place* due to past union representation. Punishing one for previous union-represented employment will have the foreseeable effect of discouraging employees from choosing in the future to work under a union contract in order to not again become ineligible for hiring due to a nonunion employer's thirty-percent rule. By extension, any algorithmic selection system that disqualifies those who have engaged in past union activities should similarly be adjudicated "inherently destructive."[76]

In the AI screening cases, extrinsic evidence of antiunion intent is unlikely to be available in most cases. Accordingly, the NLRB and the courts will need to develop uniform standards defining "inherently destructive" from which to infer antiunion intent using *Great Dane Trailers* doctrine.

Often overlooked in the *Great Dane Trailers* decision, but likely to become critically important in AI selection litigation, is the *Great Dane Trailers* holding that the burden is on the employer to show business justification at an early stage of most Section 8(a)(3) cases challenging

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[73] *See* discussion at Secunda, *supra* note 62.

[74] Hawaiian Dredging Construction Company, Inc. and International Brotherhood of Boilermakers Local 627, 362 N.L.R.B. 81 (2015) (citing D & S Leasing, 299 N.L.R.B. 658, 661 (1990), *enforced sub nom*. N.L.R.B. v. Centra, Inc., 954 F.2d 366 (6th Cir. 1994), *cert. denied*, 513 U.S. 983 (1994)).

[75] *See* Catalytic Industrial Maintenance (CIMCO), 301 N.L.R.B. 342 (1991), *enforced*, 964 F.2d 513 (5th Cir. 1992) (no evidence of specific antiunion motivation required for the NLRB to find an 8(a)(3) violation where employer discharged all of its electricians after the union that had referred them ended its 8(f) relationship with the employer); Jack Welsh Co., 284 N.L.R.B. 378 (1987) (same, where employer discharged employees after the expiration of its 8(f) contract and replaced them with unrepresented employees).

[76] *See* Barbara J. Fick, *Inherently Discriminatory Conduct Revisited: Do We Know It When We See It?,* 8 HOFSTRA LAB. L.J. 275, 305 (1991) ("[I]nherently discriminatory conduct can involve adverse impact discrimination [, for example, where] the employer's policy applies to all employees but the beneficial or detrimental impact of the policy is felt disproportionately by employees based on whether or not they engaged in union activity.").

policies having a systemic discriminatory impact. To review: In *Great Dane Trailers*, the Court made clear that "once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights *to some extent*, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him."[77] Indeed, in *Great Dane Trailers*, a Section 8(a)(3) violation was found not because the Supreme Court concluded that the employer's conduct was inherently destructive of NLRA rights but because the employer never "came forward with . . . evidence of legitimate motives for its discriminatory conduct."[78] Unlike the thirty-percent rule in *Aztech Electric*, where a business justification was proffered, in many AI selection cases it is unlikely that an employer will be able to show a legitimate and substantial business justification for adopting an AI selection policy that has the discriminatory effect of interfering with NLRA protected rights.

In recent years, the NLRB increasingly has found Section 8(a)(3) violations in non-AI cases by relying on an employer's failure to establish business justification once its conduct is shown that a management policy has had the foreseeable effect of discouraging the future exercise of Section 7 rights to some extent, even when the adverse effect on employees is "comparatively slight." For example, the NLRB has found that an employer violated Section 8(a)(3) by announcing and implementing improvements in healthcare benefits and a reduction in coinsurance, copay, and contribution rates for all employees except those eligible to vote in a pending representation election[79] and in another case where wage rates were increased for employees who did not participate in lawful union strike activity while those who participated in the strike did not receive raises, even though they performed comparable work.[80] The principle is straightforward: If the employer adopts a policy that has the foreseeable effect of discouraging the future exercise of Section 7 rights to some extent, a Section 8(a)(3) violation will be found if the employer fails to carry the burden of showing that the policy was motivated by substantial and legitimate business considerations.

It may become a formidable challenge for an employe to prove business justification for using an algorithmic management system that is shown to have a foreseeable adverse effect on employees' ability to exercise their NLRA protected rights. For example, AI management systems use software that relies on algorithmic correlations and predictions to select applicants for hiring, to identify those to discipline, and to decide

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[77] Great Dane Trailers, 388 U.S., at 34 (emphasis added).

[78] *Id.* at 34-35.

[79] *See* Woodcrest Health Care Center, 366 N.L.R.B. No. 70 (2018), *enforced sub nom.* 800 River Road Operating Co. LLC v. NLRB, 779 F. App'x. 908 (3d Cir. 2019).

[80] Sinclair Glass Co., 188 N.L.R.B. 362, 363, 370 (1971), *enforced*, 465 F.2d 209 (7th Cir. 1972).

promotions. Managing through use of algorithms diffuses responsibility, raising causation difficulties in litigation challenging adverse actions harming employees. This diffusion of responsibility might seem to provide an employer a defense in retaliatory discharge cases. For example, when Amazon was accused of discharging a warehouse employee for antiunion reasons, Amazon raised the defense that a neutral algorithm used in its management system had precipitated the discharge notice due to the employee's lack of productivity. "Local warehouse management . . . had no input, control, or understanding of the details of the system deployed."[81]

With algorithmic management, an employer might argue that a discharge notice resulted not as a result of union activity but rather from the algorithms having recently discovered new information about an employee, such as an employee's preference for large sugared drinks, which is correlated with a prediction of increased absenteeism over time. Most U.S. employment is employment at will, so a discharge might have been precipitated for any number of reasons, none of which have anything to do with union activity. The point is that proving causation becomes difficult as machine learning evolves and redefines its parameters on an ongoing basis as increased amounts of data are collected about individual employees across a wide spectrum of their lives. "[T]he key metrics . . . will continue to change,"[82] making proof of prohibited bias in the algorithmic outcomes difficult, especially in litigation taking place years after the challenged discharge. Indeed, as one author has explained, "the introduction of AI may bring employees into a vortex of massive information collection . . . and seemingly whimsical decision-making."[83]

Establishing legal responsibility for algorithmic outcomes that harm an individual worker also becomes challenging because of the need to understand and explain how AI management systems operate and generate results. Because machine learning perimeters are constantly changing and evolving as new information is added, "it can be near-impossible to reconstruct or document . . . or even discern[] a few days after the event" all of the reasons the algorithms made the decisions they made.[84]

But once an employer knows or has reason to know that its management software is generating a *pattern* of adverse decisions based on

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[81] *See* discussion at Adams-Prassl, *supra* note 3, at 134. Amazon's management system rates the productivity of each employee at the warehouse, without a supervisor's input automatically generates warning notices to an employee whose quality or productivity falls below set standards, and automatically generates a termination notice following a certain number of delinquency notices within a set time period. *Id.* at 136.

[82] *Id.* at 136.

[83] Pauline T. Kim & Matthew T. Bodie, *Artificial Intelligence and The Challenges Of Workplace Discrimination and Privacy*, 35 ABA J. LAB. & EMP. L. 289, 293 (2021).

[84] Adams-Prassl*, supra* note 3, at 142.

applicants' or employees' past, current, or predicted NLRA protected activity, the holding of G*reat Dane Trailers* provides that the burden shifts to the employer to justify use of the software. This is because deploying the software constitutes administering a policy that has the foreseeable effect of discouraging the future exercise of NLRA protected rights *to some extent*. And what substantial business considerations can the employer advance for continuing to use software that generates a pattern of antiunion discriminatory results?

2. Section 8(a)(1) — Algorithmic Management Policies that Do Not Discriminate but Interfere with Employees' Exercise of NLRA-Protected Rights

Some AI-based management systems that interfere with employees' right of self-organization do so without discriminating. An example is the chilling effect of recording speech in a break room or lunch area, locations where employees gather during nonworking time and where they have the right to discuss their working conditions.[85] In such cases, there is no discrimination, so NLRA Section 8(a)(3) is unavailable to challenge the policy. But, NLRA Section 8(a)(1) may preclude use of such surveillance. The issue becomes whether the challenged management policy unreasonably interferes with employees' exercise of their NLRA-protected rights.

Republic Aviation Corp. v. N.L.R.B.[86] is a no-solicitation work rule case, not a surveillance case. But *Republic Aviation* charts how Section 8(a)(1) cases are to be analyzed. Employer fault and proscribed motive are not the focus. Rather, the Section 8(a)(1) inquiry centers on an analysis of whether an employer's policy is an "unreasonable impediment to self-organization" and therefore unlawful — unreasonable being determined by balancing the adverse effect on the right to self-organization and the employer's need to be able to enforce the rule.[87] That balancing template still determines the outcome in Section 8(a)(1) cases.

a. Pre-AI Precedent Regarding Electronic Surveillance and Interrogation

Since its earliest days, the NLRA has banned employer surveillance to observe employees' union activities.[88] Surveillance cases divide roughly into two categories: (1) cases where the challenged policy (often newly promulgated) is shown to have been implemented in response to (because of) employee-protected activity; and (2) cases where surveillance entails enforcement of a policy, benign at its inception, that

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[85] Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

[86] *Id.*

[87] In *Republic Aviation*, the Court famously held that the employer may presumptively enforce a no-solicitation rule during worktime but not during nonworktime.

[88] *See* Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).

nevertheless has a reasonable tendency to chill employees' exercise of the right to self-organize.

Illegality due to purpose:

Under settled NLRB precedent, surveillance policies may be unlawful because the *purpose* for promulgating the policy is to interfere with employees' right of self-organization by observing their union activity.[89] The Board's decision in *National Captioning Institute, Inc.*[90] is an excellent example of this principle. There, employees had created a private, invitation-only Facebook group dedicated to discussions about unionizing at their place of employment. Two pro-union supervisors were members of the group but none of the employer's managers had access to its Facebook page. Once the employer discovered that one of its supervisors was a member of the Facebook group, the employer requested that the supervisor report on the Facebook group's membership and its activities, which the supervisor did. The Board concluded that such intentional monitoring of pro-union employees' Facebook postings violates the NLRA.[91]

In finding a violation of Section 8(a)(1), the Board in *National Captioning Institute* rejected the employer's proffered defense that the Board was precluded from finding unlawful surveillance because the employer had based no adverse employment action on the information it obtained and also because employees were not aware of the surveillance. In rejecting the former argument, the Board cited the well settled principle that out-of-the-ordinary surveillance in order to view union activity is itself an unfair labor practice. Proving a violation is not dependent on showing that the acquired information was used as a basis for an adverse employment action. [92]

Finding that at least one employee was aware that the employer was monitoring the Facebook group, the Board also rejected the second defense based on the employees' asserted unawareness of the surveillance. But, the NLRB has consistently held, and successfully argued to the Courts of Appeal, that surveillance is unlawful irrespective of whether employees are aware of it.[93] For example, the NLRB has held that an employer's agents' surreptitious electronic surveillance of a union

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[89] *See* Reno Hilton Resorts, 320 N.L.R.B. 197 (1995) (unlawful surveillance for employer to have an employee attend a union organizing meeting in order to note which unit employees attended and report that information to the employer)

[90] 368 N.L.R.B. No. 105 (2019).

[91] *Id.* (citing AdvancePierre Foods, Inc., 366 N.L.R.B. No. 133, slip op. at 1 n.4, 24-25 (2018)) (employer review of breakroom security camera footage unlawful when done in order to observe employee distribution of union literature).

[92] *Id.* (citing Sands Hotel & Casino, 306 N.L.R.B. 172, 172 (1992), *enforced mem. sub nom.* S.J.P.R., Inc. v. NLRB, 993 F.2d 913 (D.C. Cir. 1993) (per curium).

[93] *See* NLRB v. Grower-Shipper Vegetable Ass'n, 122 F.2d 368 (9th Cir. 1941).

organizer's motel room was unlawful.[94] Even creating the impression of surveillance is unlawful because "employees would reasonably assume from [the employer's actions creating the appearance of surveillance] that their union activities had been placed under surveillance."[95]

Surveillance having a benign purpose at its inception but illegal because of its chilling effect on the right of self-organization:

Employers often install surveillance systems for legitimate business reasons such as security, safety, product integrity, quality control, and discipline.[96] This otherwise benign use of surveillance sometimes can result in the employer surveilling lawful employee collective activity when, for example, a rooftop security camera photographs or videotapes protected employee conduct such as peaceful handbilling on a street adjoining employer property. In such a case, Board precedent, widely accepted by the courts, provides that such surveillance of NLRA protected conduct presumptively entails prohibited surveillance or unlawful creation of the impression of surveillance in violation of Section 8(a)(1), but the employer may introduce justifying evidence in an effort to rebut the presumption.[97]

The principle underlying the NLRB's surveillance cases is protection of employee privacy in the sense of protecting the employees' interest in "keep[ing] confidential their union activities."[98] Protecting such employee privacy is recognized as "necessary to full and free exercise of the [self-organization] rights guaranteed by the [NLRA]."[99]

The Board's interrogation and polling cases also reflect this value of protecting employee privacy. These cases hold that employer interrogation to uncover an employees' union sympathies or activities may violate Section 8(a)(1) because the natural tendency is "to instill in the minds of the employees fear of discrimination on the basis of the [confidential] information the employer has obtained."[100] The lawfulness of employee

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[94] NLRB v. J.P. Stevens & Co., 563 F.2d 8 (2d Cir. 1977).

[95] Ivy Steel & Wire, Inc., 346 N.L.R.B. 404, 404 (2006) (citing Fred'k Wallace & Son, 331 N.L.R.B. 914 (2000)).

[96] *See* discussion at JOHN E. HIGGINS, JR., THE DEVELOPING LABOR LAW 6-113-114 & cases cited at n.585. (John E. Higgins, Jr. et al. eds., 7th ed. 2017).

[97] *See id.* at 6-115 & nn.592-93. *See also* Lechmere, Inc., 295 N.L.R.B. 92 (1989) (rooftop camera that recorded NLRA protected conduct lawful since justified by security considerations), *enforced*, 914 F,2d 313 (1st Cir. 1990), *rev'd on other grounds*, 502 U.S. 527 (1992).

[98] Guess?, Inc., 339 N.L.R.B. 432, 434 (2003). *Accord* Veritas Health Servs. v. NLRB, 671 F.3d 1267, 1274 (D.C. Cir. 2012) (citing employees' right to keep confidential their union activities and the basis for the rule that for an employer to obtain information about confidential union activities, "the employer's interest in obtaining this information must outweigh the employees' confidentiality interests under Section 7 of the Act," (citing Guess?, Inc., 339 N.L.R.B. 432, 434 (2003))).

[99] Pacific Molasses Co. v. NLRB, 577 F.2d 1172, 1182 (5th Cir. 1978).

[100] NLRB v. West Coast Casket Co., 205 F.2d 902, 904 (9th Cir. 1953).

interrogation depends on the surrounding circumstances.[101] But one clear limitation on an employer's right to interrogate is that employers may not lawfully require employees to openly divulge their union sympathies to the employer, including to a supervisor. This limitation on interrogation is designed to protect employees' privacy interest in keeping union activities confidential. Accordingly, any employee polling designed to uncover employees' support for a union must be by secret ballot.[102] Nor may employers indirectly elicit employees' union sympathies, for example by a supervisor's preelection distribution of "Vote No" buttons to employees. Acceptance or rejection of the button requires the employee to make a choice regarding union support that is observable to the supervisor.[103] Protecting employees from being required to make an observable choice regarding unionization also explains why precautions are needed when an employer requests that employees agree to be videotaped and appear in an employer's antiunion campaign video. To avoid violating Section 8(a)(1), such solicitation must be in the form of a general announcement to all employees, not made directly to an individual employee or selected group of employees, in order to avoid placing the employees in a position of being required to make an observable choice in the presence of management.[104]

b. Legality of Surveillance and Management Systems Using AI and Electronic Technology

The above well-settled pre-AI Section 8(a)(1) precedent is grounded in the principle that the NLRA protects employees' privacy in "keep[ing] confidential their union activities."[105] This precedent provides the foundation for developing innovative applications of Section 8(a)(1) to protect employees from intrusions in their privacy caused by "the watchful eye of the algorithmic boss."[106]

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[101] Blue Flash Express, 109 N.L.R.B. 591, 594 (1954) (listing factors in the surrounding circumstances to consider); *accord* Bourne v. NLRB, 332 F.2d 47 (2d Cir. 1964) (agreeing with the concept of considering the surrounding circumstances but modifying somewhat the factors to be considered as set forth in *Blue Flash*).

[102] *See* Struksnes Constr. Co., 165 N.L.R.B. 1062 (1967); *see also* Allentown Mack Sales & Serc. v. NLRB, 522 U.S. 359 (1998) (holding that polls of employees already represented by a union are unlawful if employer lacks objective evidence to support a reasonable doubt that the incumbent union lacks majority support).

[103] *See* discussion and cases cited at HIGGINS, *supra* note 96, at 6-96 & n.499.

[104] Allegheny Ludlum Corp., 320 N.L.R.B. 484 (1995) (detailing additional prerequisites to protect employees from apprehension of reprisal if they choose not to participate).

[105] Guess?, Inc., 339 N.L.R.B. 432, 434 (2003).

[106] Adams-Prass, *supra* note 3, at 133.

Pre-AI NLRB precedent shows that an employer presumptively violates Section 8(a)(1) by using AI to conduct surveillance of employees during break times, in non-work areas during nonwork time, or during worktime when employers are permitted to have discussions regarding self-organization because the employer permits other types of worktime discussions.[107] The NLRA creates the right of employees to have protected conversations at the workplace but that right becomes hollow unless these conversations can take place "without the fear that members of management are peering over their shoulders, taking note of who is involved [and what is involved] in [protected conversations]."[108]

In 2022, the NLRB General Counsel announced a policy to address "intrusive or abusive methods of surveillance and automated management [that] stop[] union and protected concerted activity in its tracks . . . ."[109] The approach has two components, each an innovative application of the established NLRB precedent discussed above and each grounded in protecting employee privacy.

First, in this 2022 NLRB General Counsel policy announcement, the NLRB General Counsel urged that the NLRB should find that "an employer has presumptively violated Section 8(a)(1) where the employer's 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." With that initial burden met, the burden would shift to the employer to "establish that the practices at issue are narrowly tailored to address legitimate business needs," a burden that is met only upon a showing that "the [business] need cannot be met through means less damaging to employee rights." If the employer meets this burden to rebut the presumption of illegality, the Board would determine whether the employer's need is overriding, thus permitting the policy.[110] In many cases the NLRB would never need to engage in such balancing because many employers would be unable to carry the initial burden of showing that the challenged surveillance or automated management policy is necessary, that is that there is no less drastic way that the employer can meet its business needs other than by continuing to administer an existing policy that

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[107] Sysco Grand Rapids, LLC, 367 N.L.R.B. No 111, slip op. at 21-22 (2019) (finding that when "the Company's drivers and warehouse employees routinely discussed nonwork matters during work time before and after the union campaign, [unlawful for] supervisor [to direct union supporter] to stop talking to other employees about the union during work time"), *enforced in pertinent part*, 825 F. App'x 348 (6th Cir., 2020); Trus Joist Macmillan, 341 N.L.R.B. 369, 373 (2004) (holding that "an employer violates Section 8(a)(1) of the Act when it prohibits employees from discussing union-related matters while allowing discussion of other nonwork related subjects during working time") (citing McGaw of Puerto Rico, Inc., 322 N.L.R.B. 438, 449 (1992); Willamette Industries, 306 N.L.R.B. 1010, n.2 (1992)).

[108] Flexsteel Industries, 311 N.L.R.B. 257, 257 (1993).

[109] *See* Abruzzo, *supra* note 15, at 6.

[110] *Id.* at 8.

"would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act."

The second aspect to the NLRB General Counsel's innovative proposed approach to addressing "intrusive or abusive methods of surveillance and automated management" is that where the NLRB finds that the employers' need for the challenged policy outweighs the adverse effect on employee rights, the employer may not covertly use the challenged technologies, absent a showing for a need for covert use. Accordingly, in the General Counsel's view, the NLRB should "require the employer to disclose to employees the technologies it uses to monitor and manage them, its reasons for doing so, and how it is using the information it obtains."[111] This approach of mandating transparency is in accord with widely accepted views of the best way to accommodate AI and rights of privacy.[112]

It will take time for the NLRB and the courts to clarify which employer electronic surveillance and AI management practices, taken as a whole, "tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act." At the workplace, some surveillance policies clearly are presumptively unlawful. As noted above, any workplace electronic *surveillance system* that operates at a time and place when employees are entitled to exercise an NLRA-protected right to communicate would certainly qualify. In addition, any *work rules* that interfere with employees' "right [to] effectively . . . communicate with one another regarding self-organization at the jobsite"[113] would be presumptively unlawful.[114]

Currently available software can automate a company's day-to-day management of the productive process. Sensors contained in employee badges collect for algorithmic evaluation every move an employee makes, the proximity of one badged worker to another, whether an employee is

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[111] *Id.*

[112] *See* Sprague, *supra* note 15, at 825 (summarizing proposed federal law, the Stop Spying Bosses Act, and its emphasis on requiring covered employers to disclose any workplace surveillance and how, when, and why data are collected.); WHITE HOUSE OFF. SCI. TECH. POL'Y, BLUEPRINT FOR AN AI BILL OF RIGHTS: MAKING AUTOMATED SYSTEMS WORK FOR THE AMERICAN PEOPLE 3 (2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf (emphasizing the need for transparency in the use of AI, to include "clear descriptions of the overall system functioning and the role automation plays, notice that such systems are in use, the individual or organization responsible for the system, and explanations of outcomes that are clear, timely, and accessible").

[113] Beth Israel Hosp. v. NLRB, 437 U.S. 483, 491 (1978); *see also* Eastex, Inc. v. NLRB, 437 U.S. 556, 574 (1978) (noting that one's place of work "is the one place where employee clearly share common interests and where they traditionally seek to persuade fellow worker in matters affecting their union organizational life and other matters related to their status as employee").

[114] *See* discussion of facially unlawful work rules at *infra* notes 133-145 and associated text.

talking, with whom she is talking, and the frequency and duration of interactions with others.[115] Software venders promise that algorithms analyze the information so gathered in order "to uncover communication networks [among the employees]."[116] Even when employers are not collecting the content of employee speech, the existing AI technology raises the question of whether such constant monitoring of badged employes during their work and nonwork time, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act.

Beyond the workplace, any surveillance of an employee's activities that is calculated to uncover and collect employee NLRA-protected conduct would be presumptively invalid. Surveillance of employee online presence prior to or following hiring comes to mind. Personality tests or pre-hire games designed to identify a propensity to join with others in common cause to address workplace concerns is conduct that closely parallels the unlawful employer conduct of asking a job applicant about union membership,[117] and thus also would constitute conduct tending to interfere with or prevent a reasonable employee from engaging in such protected conduct. One software provider advertises to employers the ability to conduct background checks that "ensure that current and future employees are aligned with your mission and values [to] help you create a productive and welcoming workplace."[118] While ambiguous, this language could be interpreted as code for background checks using algorithms that predict which workers are likely to join with co-workers to obtain better conditions of employment. If so, surveilling employees for this purpose or using the information so obtained to screen out workers would be unlawful. Similarly, an employer would also need to meet the burden of showing business necessity if algorithmic management systems that assign workers have the effect of isolating workers and thereby precluding or hindering their ability to engage in conversations that are NLRA-protected.[119]

In order for employees to effectively exercise the right to have protected conversations at the workplace during non-worktime, employees must be provided reasonable amounts of non-worktime in which to have these conversations. Federal wage and hour law does not require lunch or coffee breaks, though many employers provide breaks through custom or

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[115] *See* discussion *supra* note 17 and accompanying text.

[116] *Solutions*, HUMANYZE, https://www.humanyze.com/solutions/. *See* discussion at Adams-Prass, *supra* note 3, at 133.

[117] *See* Facchina Constr. Co., 343 N.L.R.B. 886, 886 (2004) (concluding that employer "violated the [NLRA] by questioning . . . job applicants about their union affiliation or membership, and how the Union was treating them), *enforced*, 180 Fed. App'x. 178 (D.C. Cir. 2006).

[118] Adams-Prass, *supra* note 3, at 132-33.

[119] *See, e.g.*, Trus Joist Macmillan, 341 N.L.R.B. 369, 373 (2004) (unlawful to restrict employees from access to portions of the facility during working time in order to prevent them from discussing the union).

company policy.[120] It has been argued the "the breakneck pace of work set by automated systems may severely limit or completely prevent employees from engaging in protected conversations [at work]" because even when the employer provides breaks, employees cannot take a break together or at all.[121] This is not an idle concern. The reports of NLRB cases contain testimony describing algorithmic-based time and motion management systems where employees are worked ten to twelve- hours per day, up to seven days a week for several weeks in a row, leaving them exhausted. The algorithms set such an intense pace of work required to meet production standards that it takes nearly two months for new employees to reach the 100% level of productivity, and many employees are unable to meet the standard and are accordingly disciplined.[122]

A breakneck pace of work can be created when employers monitor workers using real-time productivity feedback systems, for example through a countdown timer to monitor the time between tasks.[123] Workers respond by engaging in a concerted speeding up of work in order to meet production standards. The same is true in call centers, where work rates are as close to the maximum that workers can manage. One way that workers attempt to meet a strict production schedule and improve their performance data is to skip lunch and avoiding drinking liquids in order to minimize the need for bathroom stops.[124]

With the growing use of productivity feedback systems, it is likely that the NLRB and the courts will be presented with issues raised by the

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[120] U.S. Dept. of Lab., *Breaks and Meal Periods*, https://www.dol.gov/general/topic/workhours/breaks#:~:text=Federal%20law%20does%20not%20require,determining%20if%20overtime%20was%20worked. Some states provide adult workers a statutory right to a break during the day. *See* Gustav Anderson, *Rest and Lunch Break Laws in Every US State (2024)*, WORKFORCE.COM, https://www.workforce.com/news/a-snack-sized-guide-to-lunch-break-laws.

[121] *See* Abruzzo*, supra* note 15, at 7.

[122] *See, e.g.*, Summit Logistics, Inc 337 N.L.R.B. 927, 930 (2002). The automated production system in *Summit Logistics* is described as follows:

> Each unit position has its own algorithm for determining performance . . . . On a regular basis individual employee productivity results are compiled, printed, and posted in the warehouse so that employees may see how their own performance compares to the predetermined 100-percent performance standard. Each employee in a given department is ranked by level of departmental performance every 30 hours of straight-time work. Managers and supervisors also receive copies of the performance of the employees in their units. Supervisors are evaluated based on the performance of the employees they supervise and managers are evaluated based on the performance of those employees under their management.

[123] *See* Rachel Aleks, Michael Maffie & Tina Saksida, *supra* note 17, at 93.

[124] *Id.*

breakneck pace of work that these AI driven production systems create. The NLRB might conclude that production algorithms set such a relentless pace of work that employees are unable to effectively engage in protected conversations at work with the result that an employer will need to justify this use of the production algorithm as necessary and show that there is no less drastic means for meeting the employer's needs. Such a holding by the NLRB would be consistent with well-settled NLRB precedent, albeit an application of that precedent that breaks new ground. One can imagine resistance from a conservative judiciary concluding that it is unduly intrusive on entrepreneurial freedom for the NLRB to require an employer to justify use of algorithmic driven production management systems. One variable affecting the outcome is likely to be the decisionmakers' view of the contemporary importance of the workplace as a venue for workers to share common concerns. On the one hand, the Supreme Court has confirmed the importance of the workplace for workers to communicate because the workplace is where employees "traditionally seek to persuade fellow workers in matters affecting their union organizational life." [125] On the other hand, the workplace today might no longer maintain its central significance for employee communication, in the view of some judges, given that we are in an age where cell phones, email, texting, and the dominance of social media are such widely used means to communicate.[126]

In addition to views regarding the central role of the workplace, two other factors may well influence how the judiciary responds to the NLRB General Counsel's suggested approach to evaluating the lawfulness of "intrusive or abusive methods of surveillance and automated management [systems]."[127] Both factors are related to the current growing support for unionization in U.S. culture. The first factor is what industrial sociologists refer to as the "representation gap" — nonunion workers' unmet desire in gaining a workplace voice through unionization.[128] Several studies have concluded that fifty percent (or more) of nonunion workers surveyed state that they would vote for a union if given the opportunity.[129] And

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[125] Eastex, Inc. v. NLRB, 437 U.S. 556, 574 (1978) (noting that one's place of work "is the one place where employee clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees").

[126] *See* Katsabian, *supra* note 15 at 913 ("A 2019 survey by the Pew Research Center indicates that 69% of the adult respondents use Facebook. Among young people ages 18 to 29, 67% use Instagram and 62% use Snapchat.").

[127] *See* Abruzzo, *supra* note 15, at 6.

[128] *See* RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT (1999).

[129] Thomas A. Kochan et al., *Worker Voice in America: Is There a Gap Between What Workers Expect and What They Experience?* 73 INDUS. & LAB. RELS. REV. 3, 5 (2019). *Accord* Peter D. Hart Research Associates, *The Public View of Unions* (2005) (reporting that polling shows that fifty-seven percent of workers would vote for a union if they had the chance to do so); White House Task Force on Worker Organizing and Empowerment, *Report to the President* 4, 12 (stating

consistently, a supermajority of workers currently represented by unions (eighty-three percent) state that they would vote for a union again.[130] The second factor is the nearly unprecedented public approval of unions. Gallup polling shows that sixty-seven percent of Americans now approve of labor unions and forty percent of union members say their membership is "extremely important."[131] In addition,

> [T]he new poll documents an unprecedented uptick . . . in perceptions that unions in the country will become stronger in the future than they are today. A third of Americans (34%) believe this today, compared with 19% five years ago and no more than 25% at any time in the trend since 1999.[132]

These cultural trends could be influential because legal rules and decisions "take their meanings from the social contexts in which they are deeply embedded . . . moral and political value judgments . . . are always a part of legal analysis."[133]

The NLRB's 2023 decision in *Stericycle, Inc.* also portends success in the effort to gain NLRB and judicial endorsement of the NLRB General Counsel's view of requiring employers to demonstrate business necessity for adopting electronic surveillance and AI management practices that, "viewed as a whole, tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act."[134] *Stericycle, Inc.*

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that as of 2018, fifty-two percent of nonunion workers (sixty million American workers) would vote for a union at their job if given a chance and "support for a union in their workplace rises to 74% for workers aged 18 to 24, 75% for Hispanic workers, 80% for Black workers, and 82% for Black women workers . . . ."). Economists Richard Freeman and Joel Rogers report that eighty-seven percent of workers want some form of representation in the workplace. ROGERS, *supra* note 128, at 147.

[130] Kochan*, supra* note 129, at 21.

[131] *See* Lydia Saad, *More in U.S. See Unions Strengthening and Want It That Way*, GALLUP (Aug. 30, 2023), https://news.gallup.com/poll/510281/unions-strengthening.aspx. These public approval ratings are up from sixty-four percent before the pandemic and "the 67% of Americans who approve of labor unions today is down only slightly from 71% a year ago but marks the fifth straight year this reading has exceeded its long-term average of 62%." *Id. See also* Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx#:~:text=Story%20Highlights&text=WASHINGTON%2C%20D.C.%20%2D%2D%20Seventy%2Done,on%20this%2.0measure%20since%201965.

[132] *See* Saad, *supra* note 131.

[133] Karl Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining: A Reply to Professor Finkin*, 44 MD. L. REV. 731, 736-38 (citing authority).

[134] Stericycle, Inc., 372 N.L.R.B. 113 (2023).

adopted a new legal standard to decide whether an employer's *work rule* that does not expressly restrict employees' NLRA protected concerted activity is facially unlawful under Section 8(a)(1). The NLRB's approach in *Stericycle* to evaluating the lawfulness of employer work rules is virtually identical to the approach that the NLRB General Counsel has advanced for evaluating employer electronic surveillance and management practices.

The new *Stericycle* standard adopts a modified version of the framework the NLRB adopted in 2004 in *Lutheran Heritage Village-Livonia.*[135] Under the new *Stericycle* standard, a challenged work rule is deemed presumptively unlawful if the General Counsel proves that it has a reasonable tendency to chill employees' exercise of their rights. The employer may rebut that presumption by proving that the rule advances a legitimate and substantial business interest and that the employer cannot advance that interest with a more narrowly tailored rule. If the employer makes that showing, it will be lawful for the employer to maintain the rule.[136]

Since the Courts of Appeal uniformly endorsed the framework developed in *Lutheran Heritage Village-Livonia*, the framework adopted in *Stericycle, Inc*. for evaluating the lawfulness of employer work rules could also receive a favorable judicial reception.[137] But, much has changed in the political orientation of the federal judiciary since 2004. Several years of appellate litigation will be required to determine the courts' receptivity to the amended *Lutheran Heritage Village-Livonia* framework that the NLRB adopted in *Stericycle, Inc.* Plus, the next Republican administration no doubt will appoint Board members who are more business-oriented and thus are likely to find the *Stericycle, Inc.* framework insufficiently probusiness. But, it does seem likely that as long as the *Stericycle, Inc.* analytical structure is used to decide the facial validity of employer work rules, the NLRB is likely to adopt most, if not all, of the NLRB General Counsel's approach for evaluating under Section 8(a)(1) the lawfulness of electronic surveillance and management systems since the two approaches to Section 8(a)(1) are nearly identical.

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[135] Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646 (2004). That standard controlled until it was reversed by the Republican NLRB in Boeing Co., 365 N.L.R.B. 154 (2017) and in LA Specialty Produce Co., 368 N.L.R.B. 93 (2019).

[136] The majority also rejected *Boeing*'s categorical approach to work rules that held that certain types of rules were always lawful to maintain regardless of how they were specifically drafted or what specific interests a particular employer cited as being furthered by the maintenance of those rules. The majority reasoned that a case-by-case approach will allow for consideration of the specific wording of a challenged rule, the specific industry and workplace context in which it is maintained, the specific employer interests it may advance, and the specific statutory rights it may infringe. *See* Stericycle, Inc., 372 N.L.R.B. 113, slip op. at 1.

[137] *See id.* at 2 (stating that "[n]o court rejected the *Lutheran Heritage* standard").

C. Employer Work Rules that Limit Employees' Use of Technology

Employers make full use of technology but often attempt to restrict their employees' ability to use modern technology to communicate. Employees have an NLRA-protected right to discuss wages, hours, and other terms and conditions of employment with co-workers, as well as with nonemployees such as union representatives and the media and to make recordings in furtherance of their protected concerted activity.[138] That right includes the right to use technologies needed to communicate most effectively.

1. Bans on Photographing and Recording Conversations in the Workplace

Modern technological developments have greatly expanded the means of recording conversations. A pen with a tiny digital voice recorder is available for recording conversations as are small handheld digital recorders that are small enough to be hidden within one's clothing. Recordings can be downloaded onto a computer. The ubiquitous smartphone has become the prevalent means for employees to record conversations at work. [139]

Employers routinely promulgate work rules banning employees from taking photographs and recording conversations at the workplace without permission. The lawfulness of these rules under Section 8(a)(1) will turn on an application of the *Stericycle, Inc.* analytical framework, and primarily will focus on whether employees would reasonably construe the rule's language to prohibit NLRA-protected activity. When the *Lutheran Heritage Village-Livonia* framework was in effect, which as noted above deployed an analytical approach that is nearly identical to the current *Stericycle, Inc.* framework, the NLRB routinely found many work rules banning employee photographing and recording conversations to be facially violative of Section 8(a)(1).[140]

The reasoning was straightforward. Employees have a NLRA-protected right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures and recordings.[141] Thus, rules placing a blanket ban on

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[138] *See* Richard F. Griffin, Jr., *Report of the General Counsel Concerning Employer Rules,* NLRB, OFFICE OF THE GENERAL COUNSEL (Memorandum GC 15-04) (March 18, 2015), https://www.nlrb.gov/guidance/memos-research/general-counsel-memos.

[139] *See* Marc Chase McAllister, *Employee Beware: Why Secret Workplace Recordings Are Risky Business for Employees*, 106 MARQ. L. REV. 485, 490 (2023).

[140] Griffin, *supra* note 138, at 15-17.

[141] *See* Hawaii Tribune-Herald, 356 N.L.R.B. 661 (2011), *enforced sub nom*. Stephens Media, LLC v. NLRB, 677 F.3d 1241 (D.C. Cir. 2012); White Oak Manor, 353 N.L.R.B. 795 (2009), incorporated by reference, 355 N.L.R.B. 1280 (2010), *enforced mem.* 452 F. App'x 374 (4th Cir. 2011).

workplace photography or recordings, or banning the use or possession of personal cameras or recording devices while on the employer's property, are unlawfully overbroad: These bans would reasonably be understood to prohibit the taking of pictures or recordings even during non-work time.

The Fifth Circuit Court of Appeals' 2017 decision involving T-Mobile USA is a good example of a facially invalid ban on photographing and recording.[142] The employer promulgated a work rule that stated "to protect confidential information employees are prohibited [without permission] from recording people or confidential information using cameras, camera phones/devices, or recording devices (audio or video) in the workplace."[143] Clarifying why this rule is unlawful, the Fifth Circuit explained that "the ban, by its plain language, encompasses any and all photography or recording on corporate premises at any time without permission from a supervisor. This ban is . . . stated so broadly that a reasonable employee . . . would interpret it to discourage protected concerted activity, [including] even an off-duty employee photographing a wage schedule posted on a corporate bulletin board."[144] Because broad photographing/recording bans, such as the T-Mobile work rule, control employee activities whether or not employees are acting in concert, these bans are unlawful: Their overbroad language could "chill" an employee's exercise of NLRA protected rights to engage in concerted activity.[145]

A variation of the photographing/recording ban is a work rule that totally bans the use or possession of personal electronic equipment on the employer's property or prohibits personal computers or data storage devices on employer property. These blanket restrictions on use or possession of recording devices on corporate property violate the NLRA because, while an employer has a legitimate interest in maintaining the confidentiality of business records, these rules are not narrowly tailored to address that concern. Prohibiting carrying cell phones, making personal calls or viewing or sending texts "while on duty" is facially unlawful because employees reasonably would understand "on duty" to include not just worktime but also breaks and meals during their shifts.[146]

2. Bans on the Use of Employer's Email System

The ubiquitous use of email and other information technology systems has raised the question of whether an employer may lawfully deny employees the use of an employer's email system and other electronic communication systems to communicate with co-workers about unionization or other protected activity. This issue once again requires a balancing of

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[142] T-Mobile USA, Inc. v. NLRB, 865 F.3d 265, 269 (5th Cir. 2017).

[143] *Id.* at 269-70.

[144] *Id.* at 274.

[145] *See*, *e.g.*, Whole Foods Mkt. Grp. v. NLRB, 691 F. App'x 49, 51 (2d Cir. 2017).

[146] *See* discussion at Griffin, *supra* note 138, at 16.

employer property interests with the national commitment found in Section 1 of the NLRA to "encourage and protect" workers' aspirations for industrial democracy through the declared national policy of protecting the exercise by workers of "full freedom of association [and] self-organization."

Nearly twenty years ago in *Register Guard*, the NLRB held that employers generally have the right to impose nondiscriminatory restrictions (including outright bans) on the use of employer-owned IT systems for nonwork purposes.[147] The NLRB overruled *Register Guard* in *Purple Communications, Inc.*, a case that places much emphasis on the emergence of the digital workplace, the concomitant dispersal of work locations, and the implications of the far-reaching changes in how employees communicate at the workplace.[148] In *Purple Communications, Inc.*, the NLRB held that if an employer grants employees access to its email system for personal use, then it must permit employees to use the system (on nonworking time) to communicate with each other for statutorily-protected purposes, unless the employer can prove that the need to maintain production or discipline, or to preserve the efficiency of the system itself, justifies restricting or prohibiting use of the system.

The first Trump administration's NLRB reversed *Purple Communications* in *Caesar's Entertainment*, and returned to the standard in *Register Guard*.[149] In *Caesar's Entertainment*, the Board held that "an employer does not violate the Act by restricting the non-business use of its IT resources absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other, or proof of discrimination."[150] The employer's ownership of computer equipment alone, without the need for an employer to show any other employer interest, was found to be sufficient in most cases to justify banning employee use of IT equipment for purposes related to NLRA protected activities.

The *Caesar's Entertainment* decision barely acknowledges the momentous changes in the digital workplace and the reality that, "in many [modern] workplaces, the only way that employees can feasibly communicate with each other — and especially with co-workers they don't know and never see — is via the company email system."[151] Blinded to these changes in the digital economy, the Board majority in *Caesar's Entertainment* reasoned that in a "typical workplace," oral solicitation and face-to-face-literature distribution are sufficient to allow employees to exercise their Section 7 rights, and, therefore, employer's restriction on the use of its electronic communications system does not generally "unreasonably

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[147] Register Guard, 351 N.L.R.B. 1110 (2007).

[148] Purple Communications, Inc., 361 N.L.R.B. 1050 (2014).

[149] Caesar's Entertainment, 368 N.L.R.B. 143 (2019).

[150] *Id.* at 9 n.56.

[151] Benjamin Sachs, *Privileging Property in the NLRB Email Case*, ONLABOR (Dec. 19, 2019), https://onlabor.org/privileging-property-in-the-nlrb-email-case/.

imped[e]" the exercise of the right to self-organization.[152] In cases decided after *Caesar's Entertainment*, the Trump NLRB consistently held that the dispute over employee access to employer IT equipment arose in a "typical workplace" or there was no indication that the employees did not have access to more modern forms of communication, such as use of personal e-mail and social media, that do not require using the employer's e-mail system. Thus, the NLRB routinely found the employer's restriction on its employees' use of its email system for nonwork purposes was permissible.[153]

3. Bans Regulating the Content of Employees' Social Media Communications

Employer work rules frequently chill employees from engaging in NLRA-protected communications on social media. Employer work rules regarding confidentiality provide a glaring example. These rules either specifically prohibit employee discussions of terms and conditions of employment — such as wages, hours, or workplace complaints — or are drafted using language that employees would reasonably understand to prohibit such discussions. One example might be a work rule that provides, for example, "do not discuss 'customer or employee information' outside of work, including 'phone numbers [and] addresses.'" Such a rule not only is overbroad by banning discussions regarding "employee information," (which might include wages and various conditions of employment) but the blanket ban on discussing employee contact information, without regard for how employees obtain that information, is also facially unlawful.[154] Although these unlawful confidentiality rules are not specifically directed at social media communication, they are blanket bans and thus they subject employees to discipline if the rule is violated in any way, including through communication using social media.

While communicating on social media with coworkers, employees sometimes criticize employers or protest their labor policies or treatment of co-workers, all of which is conduct that the NLRA protects. Work rules that regulate employee conduct toward the company and supervisors will be found unlawfully overbroad when these rules can reasonably be read to prohibit protected concerted criticism of the employer. For instance, in *Casino San Pablo*, the NLRB explained that a work rule prohibiting employees from engaging in "disrespectful" conduct towards the employer or management will usually be found unlawful, absent sufficient clarification or context. [155] The NLRB decision in *Quicken Loans, Inc*. demonstrates that an employee's right to criticize an employer's labor policies

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[152] Caesar's Entertainment, *supra* note 149, at 9.

[153] *See* United States Postal Service, And Roy Young, An Individual, 2021 WL 1087421 (March 18, 2021) (ALJ Opinion collecting cases).

[154] Griffin, *supra* note 138, at 4.

[155] Casino San Pablo, 361 N.L.R.B. 1350, 1351-52 (2014).

and treatment of employees includes the right to do so by taking advantage of a public forum. [156] Accordingly, an employe violates Section 8(a)(1) by promulgating a blanket ban on criticism of the company "made via websites, blogs, postings to the internet, or emails."[157]

One of the best examples of an employer unlawfully attempting to control the content of employees' communication on social media is found in the NLRB's decision in *Triple Play Sports Bar & Grille*.[158] There, the NLRB held that the employer violated Section 8(a)(1) by unlawfully discharging two employees for their protected, concerted participation in a Facebook discussion in which they complained about conditions of employment. One of the discharged employees was terminated for selecting the "like" option in responding to a Facebook posting. The other referred to the company co-owner with an expletive. Threatening employees with discharge, interrogating them about their Facebook activity, and threatening discharged employees with legal action because of his protected post on Facebook constitute NLRA violations. In addition, the NLRB majority in *Triple Play Sports Bar* found that the employer unlawfully maintained an "Internet/Blogging" policy in its employee handbook that prohibited "inappropriate discussions on the internet," a ban that employees would reasonably understand to prohibit NLRA protected discussions relating to their terms and conditions of employment.

Work rules sometimes prohibit employee social media communication with third parties — e.g., the news media, government agencies, and other third parties — about wages, benefits, and other conditions of employment. These rules also are unlawfully overbroad when they reasonably would be read to restrict NLRA-protected communications. For example, in *Trump Marina Associates*, the employer promulgated an unlawful employee handbook rule that banned releasing statements to the news media without prior approval, and authorized only certain company representatives to speak with the media. [159] "While employers may lawfully control who makes official statements for the company, they must be careful to ensure that their rules would not reasonably be read to ban

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[156] Quicken Loans, Inc., 361 N.L.R.B. 904 (2014) (unlawful to require employees to sign a document stating: "You agree that you will not . . . publicly criticize, ridicule, disparage or defame the Company or its products, services, policies, directors, officers, shareholders, or employees, with or through any written or oral statement or image (including, but not limited to, any statements made via websites, blogs, postings to the internet, or emails and whether or not they are made anonymously or through the use of a pseudonym." *See* ALJ op. at 359 N.L.R.B. 1201, 1203-04).

[157] *Id.* at 904 n.1.

[158] Triple Play Sports Bar, 361 N.L.R.B. 308, 313-14 (2014).

[159] 354 N.L.R.B. 1027, 1027 n.2 (2009), *incorporated by reference*, 355 N.L.R.B. 585 (2010), *enforced mem*., 435 F. App'x 1 (D.C. Cir. 2011).

employees from speaking to the media or other third parties on their own (or other employees') behalf."[160]

Employers sometimes promulgate work rules directly regulating employees' use of social media. One example is:

> [You must] refrain from commenting on the company's business, financial performance, strategies, clients, policies, employees or competitors in any social media, without the advance approval of your supervisor, Human Resources and Communications Departments. Anything you say or post may be construed as representing the Company's opinion or point of view (when it does not), or it may reflect negatively on the Company. If you wish to make a complaint or report a complaint or troubling behavior, please follow the complaint procedure in the applicable Company policy (e.g., Speak Out).[161]

Under the Section 8(a)(1) overbreadth principle, which is the common denominator of these work rule cases, although employers have a legitimate interest in ensuring that employee communications are not construed as misrepresenting the employer's official position, the above work rule was not limited to preventing employees from speaking on behalf of or in the name of the company. Rather, the rule generally prohibited an employee "from commenting on the company's business, financial performance, strategies, clients, policies, employees or competitors in any social media, without the advance approval," communication that an employee would reasonably understand to ban much NLRA-protected communication.

Another example of work rules directly regulating employees' use of social media is a rule that states, "You may not create a blog or online group related to your job without the advance approval of the Legal and Communications."[162] This no-blogging rule also is unlawfully overbroad: The NLRA protects employees' choices to discuss their terms and conditions of employment with their co-workers and/or the public, and the right to choose the vehicle for that communication without the company's prior approval, including use of blogs or online groups.[163]

Finally, work rules often contain some variation of a no disparagement rule, such as, "Be thoughtful and respectful in all your communications and dealings with others, including email and social media. Do not harass, threaten, libel, malign, defame, or disparage fellow professionals, employees, clients, competitors or anyone else. Do not make personal insults, use obscenities or engage in any conduct that would be unacceptable in a

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[160] *Griffin*, *supra* note 138, at 12.
[161] *Id.* at 20-21.
[162] *Id.*
[163] *Id.* at 26.

professional environment."[164] The blanket ban on "malign[ing], defam[ing], or disparag[ing]" makes this rule highly problematic. The Board has held that "'employee communications . . . are protected where the communication . . . is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless, or maliciously untrue as to lose the Act's protection.'"[165] Under the standard set forth in United States Supreme Court's decision in *Linn v. Plant Guards*,[166] and its progeny, employee comments regarding a company's conditions of employment are not unprotected as "defamatory" unless the employer can carry the burden to establish that the comments were maliciously untrue, i.e., were made with knowledge of their falsity or with reckless disregard for their truth or falsity.[167] Moreover, employee speech does not lose NLRA protection because the employee profanely voiced a negative personal opinion of a supervisor, something that easily can occur when one uses social media to communicate.[168] Accordingly, a blanket ban on all communication that is "malign[ing], defam[ing], or disparag[ing]," irrespective of context, is unlawfully overbroad.

IV. EFFECT OF AI ON REGULATION OF THE COLLECTIVE BARGAINING PROCESS

When a workforce is unionized, the introduction of new technologies needs to conform to the NLRA's regulation of the collective bargaining process. While employers and unions have experience incorporating technology into the workplace, the rise of AI poses unique challenges. From the employees' perspective, AI poses a high likelihood of changing the nature of work with respect to job roles, need for retraining, job reclassification, data privacy, surveillance, monitoring, performance evaluation, and possible loss of employment.[169] From the employers' perspective, the introduction of AI often represents substantial capital investment and

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[164] *Id.* at 23.

[165] MasTec Advanced Technologies, 357 N.L.R.B. 103, 107 (2011) (quoting Mountain Shadows Golf Resort, 330 N.L.R.B. 1238, 1240 (2000)).

[166] 383 U.S. 53 (1966).

[167] *See, e.g.*, Springfield Library & Museum Ass'n, 238 N.L.R.B. 1673, 1673 (1979).

[168] Triple Play Sports Bar & Grille, 361 N.L.R.B. 308, 313 (2014) (concluding that Facebook communication characterizing supervisor as an "asshole" in connection with the asserted labor dispute "cannot reasonably be read as a statement of fact; rather, [employee] was merely (profanely) voicing a negative personal opinion of [the supervisor]. Accordingly, we find that these statements also did not lose protection under *Linn*"). *See also* El San Juan Hotel, 289 N.L.R.B. 1453, 1455 (1988) (negative references dismissed as "rhetorical hyperbole"); NLRB v. Container Corp. of America, 649 F.2d 1213, 1214, 1215-1216 (6th Cir. 1981) (referring to manager as a "slave driver" protected rhetoric), *enforcing in relevant part* 244 N.L.R.B. 318 (1979)).

[169] *AI and the Laws of the Workplace*, *supra* note 1, at 7.

potentially significant changes in the production processes that could alter the basic scope and direction of the enterprise.[170] More than during past implementations of technologies, employers strongly favor unilateral discretion in determining whether and how to add AI, concluding that union efforts to secure joint decision-making control will obstruct, delay, and increase costs. By contrast, unions insist on a role given the likelihood that AI introduction will have adverse consequences for bargaining unit employees including layoff, reassignment, loss of bargaining unit work, and downward reclassification and concomitant loss of pay.[171] Accordingly, workplace AI implementation has raised strongly-felt competing claims with respect to whether the employer has an NLRA-enforceable bargaining obligation and the nature of that obligation.

The two most significant areas of controversy are: (1) to what extent do provisions in a current collective bargaining agreement and the parties' past practice permit an employer to avoid a bargaining obligation when introducing AI, and (2) in any event, whether the employer is excused from bargaining over the introduction of AI because AI is not a mandatory subject of bargaining within the meaning of the NLRA.[172] NLRA precedent touches on each of these questions but, of course, virtually all of that precedent predates AI, so its applicability (or inapplicability) must be determined by analogy. This analogical process will entail developing innovative applications of the NLRA.

When a unionized private sector employer introduces automation such as AI, a duty to bargain with the union can arise over the *decision* to automate, over the *effects* of the decision, or both. That duty to bargain may be determined from the parties' current collective bargaining agreement or past practices, or the duty to bargain may turn primarily on the provisions of the NLRA. Experienced labor practitioners understand that the initial focus should be the agreements contained in any current collective bargaining agreement, as well as past practices.[173]

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[170] *See generally* David E. Schwartz & Emily D. Safko, *Uncharted Territories: Unions Versus AI in the Workplace—a Legal Battle for the Future*, N.Y. L.J. (June 12, 2023).

[171] *Id.*

[172] Related to the issue of whether the decision to introduce AI is a mandatory subject of bargaining is what defenses an employer has when a union makes a demand for information concerning specifics regarding the algorithms in the AI program. *See, e.g.*, Howard Indus. Inc., 360 N.L.R.B. 111, 891 (2014) (unlawful to deny information union requested related to the algorithm used by employer "software system" to determine new production standards and how they were set; rejection of employer defense that requested information involved proprietary and trade secret information that would reveal a technologically improved manufacturing process).

[173] *See* Fisher Phillips, *Labor Law Issues for the Transit Employer Considering Automation*, FISHER PHILLIPS INSIGHTS (Sept. 9, 2019),

A. Whether the Collective Bargaining Agreement Resolves the Duty to Bargain Question

Where affected employees are represented by a union, the parties' current collective bargaining agreement often resolves the question of whether the employer is (or is not) legally constrained when contemplating mid-contract unilateral action concerning the introduction of automation, robotics, AI, etc. The general rule is that, unless waived, the duty to bargain continues during the term of a collective bargaining agreement over any mandatory subject of bargaining not already contained in the agreement.[174] Accordingly, mid-contract unilateral changes by an employer concerning mandatory subjects of bargaining may constitute a failure to bargain in good faith. The analysis begins with the application of NLRA Section 8(d) to the facts of a particular case.

First, Section 8(d) provides that the employer or the union may *refuse* to bargain midterm over any subject of bargaining already "contained in a [their current] contract." By extension, it is a breach of the duty to bargain to unilaterally modify the terms and conditions of the existing contract. [175]

Thus, the parties may have discussed and agreed on how future automation decisions are to be made and their agreement in this regard is "contained in" their current contract. For example, a collective bargaining agreement may contain a work preservation clause that bars any unilateral action by the employer, i.e., action without the union's consent, that has the effect of causing job loss to bargaining unit employees through, for example, the introduction of automation.[176] Think of this as a waiver by the employer of its statutory right to make any unilateral changes during the term of the contract with respect to matters covered by the work preservation provision in the contract.

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https://www.fisherphillips.com/en/news-insights/autonomous-vehicles-blog-driving-the-future/labor-law-issues-for-the-transit-employer-considering-automation.html.

[174] *See, e.g*., NLRB v. Jacobs Mfg. Co., 196 F.2d 680 (2d Cir. 1952), *enforcing*, 94 N.L.R.B. 1214 (1951).

[175] The Supreme Court has held that the NLRA Section 8(d) prohibition of a unilateral modification of an existing contract term constitutes a breach good faith bargaining only if the contract term modified is a mandatory subject of bargaining. *See* Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971). Thus, where, contrary to the provisions of a work preservation clause and without the union's consent, an employer unilaterally transferred work out of the bargaining unit, the NLRB held that Section 8(d) was violated only after finding that the work transfer decision was a mandatory subject of bargaining. Brown Co., 278 N.L.R.B. 783 (1986).

[176] Where automation threatens to displace workers, unions often attempt to negotiate work preservation clauses into collective bargaining agreements. Typically, these work preservation provisions provide for "worker participation rights, wage saving provisions, and retraining for displaced workers." *See* Christie A. Moon, *Technology, Robotics, and the Work Preservation Doctrine: Future Considerations for Labor and Management*,14 PEPP. L. REV. 403 (1987).

Or, to the contrary, a management rights clause contained in an existing collective bargaining contract may reserve automation implementation decisions to management. In that case, the employer has no duty to bargain with the union over implementing an AI production management or employee monitoring system, for example. The employer may unilaterally implement these systems. Think of this as a waiver by the union of the right to insist on bargaining to impasse before the employer can implement changes in conditions of employment, such as introducing AI.

The NLRB and the courts should be reluctant to find that a union has agreed to contractual language relinquishing its right to demand mid-contract bargaining over the implementation of automation that could have a substantial adverse impact on bargaining unit members. An employer's claim that a union has waived its statutory right to insist on bargaining may be bogus or constitute at best a merely colorable management rights claim. Well-settled NLRB and judicial precedent provide that such waiver claims by an employer will be strictly construed. The Supreme Court has made it clear that where an employer claims such a waiver by a union, the test is whether the asserted waiver is "clear and unmistakable."[177] No clear-cut test has been developed regarding what contractual language in a management rights clause is sufficient to secure a "clear and unmistakable" right for an employer to act unilaterally. The NLRB has stated that a waiver is not to be construed as applicable beyond the "specific reference" of the subjects of bargaining set forth in the contract language purporting to constitute a waiver.[178] Accordingly, broadly worded management rights clauses with catchall phrases such as "Company retains the responsibility and authority to manage the Company's business" lack any specific reference to the subjects of bargaining waived and thus "will fall short of being a "clear and unmistakable" relinquishment of the union's right to demand bargaining.[179] For example, in *Johnson-Bateman Co.*,[180] the NLRB held that a management rights clause would not be interpreted to have waived a union's right to demand bargaining over drug and alcohol testing because the clause was "couched in the most general of terms and makes no reference to any particular subject areas, much less a specific reference to drug/alcohol testing." But a narrowly drawn waiver in a collective bargaining agreement can secure management's right to implement automation unilaterally. A good example is *Justesen's Food Stores, Inc*.,[181] where the NLRB held that the employer's unilateral implementation of technology fell within a contract clause that expressly exempted from future bargaining any installation of mechanized equipment currently in use within the trade.

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[177] Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983).

[178] New York Mirror Division, Hearst Corp., 151 N.L.R.B. 834, 840 (1965).

[179] *See* discussion and cases cited at *Developing Labor Law*, *supra* note 96, at 13-189 through 13-190.

[180] 295 N.L.R.B. 180, 185 (1989).

[181] 160 N.L.R.B. 687 (1966).

In limited circumstances, an established past practice can secure an employer's right to implement mid-contract change unilaterally. Such is the case when negotiation history demonstrates that at the time the current contract was signed, the parties agreed to continue "the practice of [certain changes traditionally residing] within the unilateral control of the [employer]." The theory is that the agreement to continue the past practice became part of the parties' contemporaneous agreement.[182]

B. Mandatory Subjects of Bargaining

If the collective bargaining agreement is silent with respect to securing an employer's right to unilaterally implement automation in the workplace, and no controlling past practice privileges such unilateral implementation, the NLRA's statutory obligations to bargain come into play. The NLRA requires employers and unions to meet and confer in good faith and bargain with respect to wages, hours, and other terms and conditions of employment. The NLRB and the courts primarily litigate controversies over whether a subject of bargaining, such as automation, constitutes a "condition of employment" and thus is a "mandatory subject of bargaining" that must be negotiated. If not, then the subject is a "permissive subject of bargaining" that may be negotiated but there is no legal duty to do so. If automation constitutes a subject of mandatory bargaining, and there is no language "contained in" the contract regarding automation, there is an ongoing duty to bargain mid-contract. In these circumstances, the rules of bargaining to impasse apply. The employer does not require the union's consent to implement but must bargain to impasse over the decision to be permitted to implement unilaterally.[183] Even if the decision to automate is a permissive subject of bargaining, bargaining is required over the effect of automation on the bargaining unit.[184]

In short, for each party, it is vitally important whether the NLRB and the courts conclude that the introduction of technology into the workplace

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[182] *See* New York Mirror Division, Hearst Corp. *supra* note 75 at 848. *See also* Lufkin Foundry & Machine Co., 181 N.L.R.B. 187, 189-90 (1970) (no bargaining duty because no modification of current conditions of employment where employer introduction of automation was of the type to which the union previously had acquiesced evidencing that the disputed technological change was within the parties' earlier understandings of established past practice and thus was a continuation of the status quo).

[183] If the employer bargains to good faith impasse, the employer may unilaterally implement its last offer to the union. NLRB v. Katz, 369 U.S. 736 (1962). A union waives its right to insist that the employer bargain to impasse before implementing if (a) the union fails to protest unilateral action or (b) becomes aware of a management decision to automate and fails to demand bargaining. *See* discussion and cases cited at *Developing Labor Law*, *supra* note 96, at 13-179 through 13-180.

[184] Omaha Typographical Union, No. 190 v. NLRB, 545 F.2d 1138, 1141 (8th Cir. 1976).

is a mandatory or is a permissive subject of bargaining. The Supreme Court has not resolved the question.[185] Nearly forty years ago, Professors Nicholas Ashford and Christine Ayers correctly observed that there can be no single answer to the question of whether the introduction of automation into the workplace is mandatory or permissive subject of bargaining because automation varies, and as a result, the law is unclear.[186]

> [T]echnological change can take many different forms and thus impacts the workplace in many different ways. Technological change may involve merely changing the processes within a plant or office by introducing new production processes and methods. On the other hand, the change may involve restructuring the operation so that subcontracting, relocating the plant, transferring operations, or even partially closing the business become necessary. [187]

What has developed is great difficulty in finding coherency in duty-to-bargain decisions involving automation.

That said, the forty years since the Ashford & Ayers article was published have somewhat narrowed the factors that the NLRB and the courts will evaluate to decide, on a case-by-case basis whether the introduction of technology into the workplace is a mandatory subject of bargaining. Two factors predominate: (1) whether the decision to automate significantly affects bargaining unit employees; and, if yes, (2) whether requiring bargaining over automation is deemed to infringe upon a traditional area of managerial prerogative because adding certain technology entails major structural changes in fundamental business operations, such as changes in an enterprises' capital structuring, its production processes, and the basic scope and direction of the enterprise.

In most cases, though not necessarily all, adding an AI automated surveillance or an AI production management system at the workplace will significantly affect bargaining unit employees' terms and conditions of employment.[188] That effect may entail substantially changing the nature

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[185] *See* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 686 n.22 (1981) ("In this opinion we intimate no view as to [introductions of] automation . . . which are to be considered on their particular facts.").

[186] Nicholas A. Ashford & Christine Ayers, *Changes And Opportunities in the Environment for Technology Bargaining*, 62 NOTRE DAME L. REV. 810, 821 (1987).

[187] *Id.*

[188] Bargaining over hiring practices must be distinguished. Prior to implementation, there is no duty to bargain over hiring practices, e.g., the decision to use AI as part of an employer's recruitment, screening and hiring effort. *See* United States Postal Service, 308 N.L.R.B. 1305 (1992), *enforced in part*, 18 F.3d 1089 (3d Cir. 1994) (after implementation there is a duty to bargain and duty to supply information over aspects of the hiring practice that the union has an objective basis for concluding may discriminate).

of jobs,[189] changing work assignments,[190] or eliminating or diminishing bargaining unit work.[191]

It is well-established that the unilateral use of technology to monitor employees' behavior is a mandatory subject of bargaining.[192] The Board has found that an employer must bargain over the decision to install surveillance cameras by analogizing the use of surveillance cameras to physical exams, drug/alcohol testing requirements, and polygraph testing, all of which are employer investigatory tools or methods to ascertain whether any employees engaged in misconduct and all of which are mandatory subjects of bargaining. In addition, adding hidden cameras in a restroom add privacy concerns that add to the potential effect on employees' working conditions.[193] But even when personal privacy is not threatened, such as using hidden cameras in and around offices to investigate specific cases of suspected wrongdoing, the employer is obligated to first bargain with the union.[194]

Another good example of automation deemed to have a significant impact on bargaining unit employees is the introduction of autonomous vehicle technology adaptable to transit operations (converting to advanced driver assistance and autonomous vehicles in the transit industry). These developments are calculated to produce "future operational savings in part through the elimination of driver and maintenance staff positions and

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[189] *See* Metromedia, Inc. v. NLRB, 586 F.2d 1182, 1187 (8th Cir. 1978) (television station owner was obligated to bargain over decision to use "minicams" — miniature television cameras — due to this technological innovation having the potential to profoundly affect the work of motion picture cameramen, including permitting persons not in the cameramen's bargaining unit to perform cameramen's work).

[190] *See* Essex Valley Visiting Nurse Ass'n, 343 N.L.R.B. 817 (2004) (unilaterally transferring four nurses from administrative in-house positions to field nurse positions). The introduction of automation or other technological changes may require employees to develop skills and perform job duties of a classification excluded from the bargaining unit, in which case the employer need not bargain over removing such employees from the bargaining unit. *See also* BASF Wyandotte Corp., 276 N.L.R.B. 1576 (1985) (introduction of automated steam generating facility required creation of a new utility technician position to monitor newer and more sophisticated equipment and bargaining unit excluded technician positions).

[191] *See, e.g.*, Regal Cinemas, Inc. v. NLRB, 317 F.3d 300 (D.C. Cir. 2003) (duty to bargain over a transfer of bargaining unit work to non-unit employees to be determined by *Fibreboard*/*Torrington* framework because loss of unit work did not involve relocation of the business — *see* discussion of *Fibreboard/Torrington* at *infra* notes 200-205 and accompanying text).

[192] *See, e.g.*, Anheuser-Busch, 342 N.L.R.B. 560 (2004); National Steel Corp., 335 N.L.R.B. 747 (2001), *enforced,* 324 F.3d 928 (7th Cir. 2003); Colgate-Palmolive Co., 323 N.L.R.B. 515 (1997).

[193] *See* Colgate-Palmolive Co., 323 N.L.R.B. at 515.

[194] National Steel Corp., 335 N.L.R.B. at 747 (2001).

reduced overtime." And, for those who are still employed, "job responsibilities will change, and new skills will be required."[195]

In short, most AI will have a significant impact on workers. Far more uncertain is whether the NLRB and the courts will find no duty to bargain because requiring bargaining would infringe upon a traditional area of managerial prerogative. As shown next, that conclusion is likely to turn on whether adding automation to the workplace is viewed as more like subcontracting, which the Supreme Court has held is a mandatory bargaining subject,[196] or more like a partial plant closing, which is far more likely to be viewed as a permissive bargaining subject.[197]

For many years, the NLRB has been adjudicating the duty-to-bargain implications of introducing workplace automation. In the 1960s, the NLRB routinely concluded that the transition to robotics and the introduction of other automation that significantly affected an employer's unionized workforce was a mandatory subject of bargaining.[198] The leading case was the 1962 decision in *Renton News Record*,[199] holding that a newspaper had a duty to bargain over a change of operations involving conversion from hot-type to cold-type composition, which improved the volume of production and lowered costs but adversely affected bargaining unit employees due to loss of bargaining unit jobs.

In 1964, the Supreme Court decided *Fibreboard Paper Products Corp. v. NLRB*.[200] *Fibreboard* involved the duty to bargain over subcontracting: automation was not at issue. In *Fibreboard*, work performed by bargaining unit employees was transferred to a subcontractor whose employees engaged in the same or similar work under similar conditions of employment as had prevailed when the bargaining unit employees performed the work. In an influential concurring opinion, Justice Stewart distinguished typical subcontracting from management decisions that are not subject to collective bargaining because they "concern[] the commitment of investment capital and the basic scope of the enterprise," decisions that "lie at the core of entrepreneurial control."[201]

On the one hand, introducing workplace technology such as AI might be viewed as analogous to subcontracting because, like subcontracting,

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[195] *Labor Law Issues for the Transit Employer Considering Automation*, *supra* note 170.

[196] Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 209 (1964).

[197] *See, e.g.*, First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666 (1981) (holding that an employer does not have a duty to bargain when deciding to close part of its business).

[198] *See* Garry Mathiason et al., *The Transformation of the Workplace through Robotics, Artificial Intelligence, and Automation: Employment and Labor Law Issues, Solutions, and the Legislative And Regulatory Response*, 6 n.21 (Littler Mendelson, P.C., 2016) (citing Renton News Record, 136 N.L.R.B. 1294 (1962)), http://www.jdsupra.com/legalnews/the-transformation-of-the-workplace-95769/.

[199] 136 N.L.R.B. 1294, 1296 (1962).

[200] Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).

[201] *Id.* at 223.

automation often removes/reduces bargaining unit work. Instead of substituting one employee group for another, automation transfers the work out of the bargaining unit to a machine. But automation can differ substantially from subcontracting. Subcontracting typically makes no change in the basic direction and scope of the business, does not alter the basic operation or scope of the business, and does not entail a significant capital investment. The same cannot be said of many decisions implementing AI production management systems, for example.

Fibreboard ultimately became the basis of the NLRB's *Torrington* line of cases.[202] There, the Board held that a decision to subcontract the work of employees unaccompanied by any substantial commitment of capital or change in the scope of the business was not a decision that is at "the core of entrepreneurial control," and, therefore, is subject to decision bargaining. After *Fibreboard*, the NLRB continued to find a duty to bargain over the decision to introduce automation that significantly adversely affected bargaining unit employees. Because automation substitutes labor-saving machinery for human labor, the Board analogized automation to the subcontracting at issue in *Fibreboard*.[203] Several of these NLRB cases concerned the newspaper industry, which adjudicated duty-to-bargain issues arising from the introduction of technological changes that replaced workers in composing rooms[204] or changed other operations that adversely affected unionized employees.[205]

During this post-*Fibreboard* period, some courts began exempting employers from the duty to bargain in partial business-closing cases, where the partial business closing had a significant impact on fundamental business operations by "require[ing] major structural changes and extensive costs which generally fall into the classification of capital improvement, an area which management traditionally has the right to control."[206] Two leading cases were *NLRB v. Drapery Mfg. Co.*,[207] involving a decision to close a subsidiary for economic reasons, and *NLRB v. Royal*

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[202] Torrington Indus., 307 N.L.R.B. 809, 810 (1992).

[203] *See* Richland, Inc., 180 N.L.R.B. 91, 102 (1969); Northwestern Publ'g Co., 144 N.L.R.B. 1069, 1084 (1963).

[204] Columbia Tribune Publ'g Co., 201 N.L.R.B. 538, 538 (1973) (technological changes in production that might "require lesser skills" and that might "justif[y] . . . paying lower rates").

[205] Northwestern Publ'g Co., 144 N.L.R.B. at 1071 (a new system of bundle delivery by a newspaper entailed the consolidation of some bundle routes, resulting in some bundle drivers being laid off, and the discontinuation of unprofitable tube routes).

[206] Christie A. Moon, *Technology, Robotics, and the Work Preservation Doctrine: Future Considerations for Labor and Management*,14 PEPP. L. REV. 403, 408 (1987).

[207] NLRB v. Drapery Mfg. Co., 425 F.2d 1026, 1027 (8th Cir. 1970).

Plating & Polishing Co.,[208] where a company closed a location due to its unprofitability. In *NLRB v. Adams Dairy, Inc*.,[209] the NLRB lost a major case when the Eighth Circuit refused to enforce an NLRB decision finding a duty to bargain over an employer's decision to change product distribution by replacing its employees with independent contractors. These Courts limited *Fibreboard* to its narrow facts — a company's decision to contract out the maintenance work that did not alter the company's basic operation, that contemplated no capital investment, and entailed merely replacing existing employees with those of an independent contractor to do the same work under similar conditions of employment. By contrast, in *Adams Dairy*, the Court concluded that the company made a basic operational change by deciding to completely change its existing distribution system by selling its products to independent contractors.[210]

In 1981, in *First National Maintenance Corp. v. NLRB*,[211] a partial-business-closing case, the Supreme Court endorsed the view that there is no duty to bargain over an economically motivated managerial decision if the decision entails a change in the basic scope or operation of the enterprise. The severity of the adverse effects of the decision on bargaining unit employees is immaterial if, as the Court found in *First National Maintenance Corp.*, the burden of a management duty to bargain outweighs any benefits to labor-management relations.[212]

Fibreboard/Torrington on the one hand and *First National Maintenance* on the other frame the issue today with respect to whether an employer must bargain over the decision to introduce AI that has a significant adverse effect on bargaining unit employees.[213] The pro-management balancing test that is the foundation of the *First National Maintenance*

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[208] NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 194 (3rd Cir. 1965). The decision to close smaller plant due to unprofitability was not an unfair labor practice. *Id.* at 196.

[209] Adams Dairy, Inc., 137 N.L.R.B. 815 (1962), *enforcement denied*, 350 F.2d 108 (8th Cir. 1965).

[210] NLRB v. Adams Dairy, Inc., 350 F.2d at 111 ("After the decision was made by the dairy to sell its products dockside to independent distributors, all of the trucks used previously by driver-salesmen were sold to independent distributors.").

[211] First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 679-86 (1981).

[212] *Id.* at 680-86. In *First National Maintenance*, an employer eliminated jobs when it discontinued, for economic reasons, an unprofitable contract, a decision that the Court concluded represented a significant change in the company's operations.

[213] A third test, articulated in Dubuque Packing Co., 303 N.L.R.B. 386 (1991*), enforcement denied in part sub nom.* United Food & Com. Workers Int'l Union, Loc. No. 150-A v. NLRB, 1 F.3d 24 (D.C. Cir. 1993), is applied for management decisions involving a geographic *relocation* of bargaining unit work representing a significant change in the nature of the employer's operation. *See also* 1621 Route 22 W. Operating Co., 2013 WL 167929 (N.L.R.B. Div. of Judges 2013).

framework might be distinguished in many cases involving automation and introduction of technology. Decisions to automate typically do not involve the cessation or transfer of operations. Rather, they merely modify the way work is performed. However, significant changes in the way work is performed might sometimes entail altering the basic scope and direction of an enterprise because the production process is so extensively modified and implementing these decisions may require considerable capital investment. Then, the decision to automate would likely be ruled a permissive subject of bargaining by applying a *First National Maintenance* framework of analysis. The Supreme Court has provided no additional guidance since its 1981 decision in *First National Maintenance* regarding whether *Fibreboard* or *First National Maintenance* is the appropriate analysis in a case involving the duty to bargain over the decision to implement automation.

Since the Supreme Court's decision in *First National Maintenance*, the NLRB regularly has held that an employer must bargain when a decision to implement technology is likely to result in job displacement.[214] There is, however, post-*First National Maintenance* judicial precedent holding that implementing laborsaving technology is a management prerogative not requiring decision bargaining.[215]

The leading NLRB decision currently is *O.G.S. Technologies, Inc.*[216] Factually, this case blends automation and subcontracting. In *O.G.S. Technologies*, the employer contemplated upgrading the company's die-cutting capabilities through the purchase of high-tech laser and computer-based technologies, which would have resulted in the elimination of bargaining unit jobs. The company decided not to purchase this die-cutting

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[214] *See, e.g.*, Winchell Co., 315 N.L.R.B. 526, 536 (1994), *rev. granted sub nom.* NLRB v. President Container, 74 F.3d 1227 (3d Cir. 1995) (a printing company could not unilaterally lay off its pre-press employees merely because it had invested in desktop computers that allowed its customers to prepare their own material for printing); Plymouth Locomotive Works, Inc., 261 N.L.R.B. 595, 602 (1982) (computerization of the time keeping function and elimination of the position of timekeeper does not excuse the duty to bargain); *see also* Leach Corp., 312 N.L.R.B. 990, 996 (1993) (following a need to relocate production facilities due to a change from a "batch" method of production to a "just-in-time" method, a duty to bargain with the union remained although the just-in-time method required different employee skills, duties, and classifications); *cf.* Okla. Fixture Co., 314 N.L.R.B. 958, 960 (1994) *enforcement denied on other grounds,* 79 F.3d 1030 (10th Cir. 1996) (bargaining over subcontracting was not required because the decision was based on "core entrepreneurial concerns [—] involv[ing] considerations of corporate strategy fundamental to preservation of the enterprise").

[215] NLRB v. Island Typographers, 705 F.2d 44, 50, n.8 (2d Cir. 1983) (finding that the union had waived the right to bargain over the introduction of technology, but stating that if there had not been a waiver by the union, the "decision to update the plant's technology fits within [the *First National Maintenance* category] of managerial decisions" requiring the employer-friendly balancing test).

[216] 356 N.L.R.B. 642 (2011).

technology. Instead, without bargaining with the union, the company shifted bargaining unit die-cutting work to firms that used this laser and computer-based technology and then eliminated its die engineer bargaining unit classification, causing loss of bargaining unit jobs.

Relying on *Fibreboard/Torrington,* the NLRB in *O.G.S. Technologies* found a duty to bargain. The Board rejected the company's claim that subcontracting and eliminating some bargaining unit jobs was an entrepreneurial decision affecting an enterprise's scope and direction, and thus the company had no duty to bargain before implementing the transfer of bargaining unit work. The NLRB concluded that the employer-friendly *First National Maintenance* balancing test should be reserved for cases involving "partial closing" of the business or other fundamental changes in a company's scope and direction. Such a change in scope and direction is to be determined by evaluating the "essential continuity in [the company's] operations." This is measured by examining the end product of the production process: whether the company had "remained devoted to the manufacture and sale of [the same products] to the same range of customers" or whether it had "abandon[ed] a line of business or . . . contract[ed] the existing business."[217] In short, there is no change in the scope and direction of an enterprise if introduction of technology "changed the [company's] operation by degree not kind."[218]

The current rules for determining whether there is a duty to bargain over the introduction of workplace technology are highly malleable. Their pliancy renders them susceptible to an *ad hoc* balancing of management and labor interests that easily can maximize employers' need to be shielded from decisional bargaining obligations in a highly competitive global marketplace and trivializes the legitimacy of labor objectives.[219]

The dissenting opinion in *O.G.S. Technologies* demonstrates how easily the fluid rules for ascertaining a duty to bargain can be manipulated. The dissent pointed out that the flexible rules exempted the employer from

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[217] *O.G.S. Techs., Inc*., 356 N.L.R.B. 642, 645 (2011).

[218] *Id.* The N.L.R.B. held that the case is controlled by *Fibreboard* and *Torrington* even though the subcontracting decision was based on the company's desire to increase the speed of production through "technological improvements in the die-making process." The determination whether subcontracting is a mandatory subject of bargaining "does not depend on whether the [company's] decision to replace [unit employees] with nonunit personnel was motivated by labor costs in the strictest sense of that term [for] *Fibreboard* controls when the decision 'involved unit employees' terms of employment and it did not 'lie at the core of entrepreneurial control.'" *Id.* at 646 (citing *Torrington*, 307 N.L.R.B. at 811).

[219] *See* Alicia Gabriela Rosenberg, *Comment, Automation and the Work Preservation Doctrine: Accommodating Productivity and Job Security Interests*, 32 UCLA L. REV. 135, 171 (1984).

having to bargain over implementing workplace technology. The dissent in *O.G.S. Technologies* found no duty to bargain by arguing:[220]

> The [Employer's] president testified that he had determined, . . . that the hand-cut die-making process . . . was no longer economically viable . . . . [C]ompetitors, primarily based in China, using newer, laser-and computer-based technology, could turn around button dies [far quicker than the Employer]. Given the prohibitive capital costs of acquiring the sophisticated machinery necessary to produce dies suitable for modern production requirements, and the continuing evolution of die-cutting technology, the [Employer] made the core entrepreneurial decision to cease the use of hand-cut production methods . . . and to rely solely on more modern processes and equipment used by available subcontractors. That decision concerned whether and how to commit investment capital and represented a fundamental realignment of the [Employer's] production processes; precisely the type of core entrepreneurial decision *vital to survival in our highly competitive global marketplace and shielded from decisional bargaining obligations* under *First National Maintenance* and its progeny.
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> . . . There is no doubt that the cumbersome and inefficient work performed by the hand cutters differed substantially from the automated laser- and computer-based methods employed by subcontractors. The [Employer's] ability to rapidly adapt its production methods to capitalize on more efficient and cost-effective technology is critical to its ability to compete internationally.

AI is here and more is coming. Management decisions increasingly will result in job displacement due to technological innovation and the NLRB and the Courts will continue to be called upon to determine whether the result is a change in the scope and direction of the business. The majority in *O.G.S. Technologies* in effect set the default as no exemption from the duty to bargain by focusing on the essential continuity in the company's operations, as measured by continuity of the products produced and customers served.[221] The dissent in effect set the default as no

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[220] O.G.S. Techs., Inc., 356 N.L.R.B. 642, 648 (2011) (Hayes, dissenting) (emphasis added).

[221] *Accord* NLRB v. Solutia, Inc., 699 F.3d 50 (1st Cir. 2012) (duty to bargain over transfer of bargaining unit work to employees represented by a different union at another company location as part of a consolidation of testing facilities because transfer was not a change in the scope and direction of the business where employer continued to produce the same products using the same equipment, and there was no change in the number or types of test performed after consolidation).

duty to bargain by shielding the employer from a bargaining obligation when technology is being introduced because current production methods are no longer economically viable — which is virtually always the reason for introducing workplace technology. The first Trump administration's NLRB chose not to endorse the 2011 *O.G.S. Technologies* framework[222] and the next Republican NLRB can be expected to follow that lead.

The cases discussed above show that the NLRA can protect unionized workers' interests by requiring decision bargaining in most cases involving the implementation of AI surveillance and production management technology — cases where the introduction of technology "changed the [company's] operation by degree not kind." But in the hands of pro-business decisionmakers, the same NLRA language can be interpreted to deny workers a role in technology implementation decisions that are likely to threaten their jobs and chances for future employment. Requiring bargaining could be beneficial to the parties' long-term relationship.[223] Moreover, union input could assist in prioritizing issues such as data protection, worker privacy, and the impact of AI on working hours and job quality. And as the NLRB has pointed out, at least "in some cases, the adverse effect of changes in operation brought about due to improved, and even radically changed, methods and equipment, could be at least partially dissipated by timely advance planning by the employer and the bargaining representative of its employees."[224]

CONCLUSION

The rise of workplace AI has launched a transformative phase in labor and employment law. Technological advancements will challenge the law's ability to serve its traditional role of effectively balancing competing but legitimate interests. It is misguided to conclude that we need a new labor relations statute to resolve labor and employment issues created by the introduction of workplace AI. Some legislation addressing transparency and digital privacy may be warranted. But what we need most is a commitment from NLRB members and the courts to develop standards that respect workers' stakeholder interest in AI and take seriously the pledge we made to workers in 1935 in Section 1 of the NLRA, of "encouraging the practice and procedure of collective bargaining."

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[222] *See* Bobs Tire Co., Inc., 368 N.L.R.B. No. 33, n.5 (2019) (transferring bargaining unit work to third parties who use technologically advanced machinery is a mandatory subject of bargaining because there is no change in the nature, scope or direction of its operation but the Republican-appointed Board members conspicuously avoided approving ALJ's reliance on *O.G.S. Technologies*).

[223] *See, e.g.*, Brockway Motor Trucks, 582 F.2d 720, 734-35 (3d Cir. 1978) (bargaining over partial closing "would at least help foster respect for the role of each side as a subject in the controversy, and not as a mere object to be treated in accordance with the other's will").

[224] Renton News Record, 136 N.L.R.B. 1294, 1297 (1962).