AS A MUSICIAN, WHAT ARE YOUR PRIVACY RIGHTS?

HINT: They're worse than you think. But there could be hope on the horizon for New Yorkers...

LEGAL CORNER

HARVEY MARS, ESQ.

Harvey Mars is counsel to Local 802. Legal questions from members are welcome. E-mail them to **HsmLaborLaw@HarveyMarsAttorney.com**. Harvey Mars's previous articles in this series are archived at **www.HarveyMarsAttorney.com**. (Click on "Publications & Articles" from the top menu.) Nothing here or in previous articles should be construed as formal legal advice given in the context of an attorney-client relationship.

IT IS WELL known that when you enter your place of employment, your expectation of privacy is severely limited. This is no less true for musicians than it is for other employees. While they are on the job, musicians may be subject to video surveillance, they may have their lockers (or instruments) searched, and they may be subject to drug testing. Only through collective bargaining or other contractual provisions can employees' privacy concerns be addressed and remediated. Collective bargaining terms can be negotiated that limit an employer's ability to infringe on employee's expectation of privacy. But of course, this is not always possible in bargaining.

However, New York state does have some statutes that protect employees' privacy. New York has laws that limit an employer's ability to electronically monitor employees (see New York Labor Law Section 203-c). Employees may not be videotaped in the bathroom or any area where they may need to change clothes. New York also provides judicial relief for invasion of privacy under sections 50 and 51 of the New York Civil Rights Law. Section 51 states that written consent is required before a person's name, portrait or picture can be used for trade or advertising purposes – and that includes employees.

Nonetheless, despite these laws, the legal protections accorded employees to preserve privacy in basic areas where one would expect privacy to exist are woefully deficient. One major area where privacy should be sacrosanct is electronic and personal identifying data. One would expect that severe limitations would exist on an employer's use of such data. Unfortunately there are not any. Currently the only area where the legislative branch has addressed this issue is when there is a data breach. Employers are required to notify employees of a data breach (see General Business Law Section 899-aa, also known as the information security breach and notification act). Further, employers are barred from using employees' social security numbers without the individual's consent (see General Business Law Section 399-dd).

The pitfalls that employees may be subject to with respect to electronic data were demonstrated to me recently when I was contacted by a musician employed by an upstate opera company who was forced to sign an application permitting payroll to be administered through a company called Paychex. While this may seem harmless in and of itself, the Paychex privacy statement indicates that personal data may be disclosed to governmental agencies, attorneys, accountants, auditors, credit reporting agencies and employees of affiliated companies, without limitation. The employee was advised by their employer that if he or she did not sign the application, they would not be paid. The musician, not being able to sustain a loss of income, yielded and signed the application.

At first blush this may seem like a violation of the National Labor Relations Act's prohibition on unilateral modification of employment terms. Unfortunately it is not. The NLRA only prohibits unilateral changes that substantially impact employees' terms and conditions of employment. The modification of an employer's payroll system is not a mandatory topic of bargaining as it marginally impacts actual terms of employment. For example, the modernization of an employer's inventory system was not seen as a mandatory topic of bargaining in the case United Technologies Corporation and IAM Local Lodge 700, 287 NLRB No. 16 (1987).

However, in that case, the union was still able to initiate "effects" bargaining. While the union could not bargain over implementation of the new inventory system, it could negotiate over the impact the new system had on the workplace, such as the elimination of overtime or shift differentials.

But in the opera company case, there was no effects bargaining. Effects bargaining requires a diligent union and a collective bargaining agreement, or a group of highly motivated workers willing to engage in concerted activity.

While bargaining rights may be limited with respect to an employer's use or collection of employees' electronic data, there is a prospect of New York legislation on the horizon. In early November 2017, former New York Attorney General Eric Schneiderman proposed a bill called "Stop Hacks and Improve Data Electronic Security Act" (SHIELD) to the New York legislature. This legislation would serve to limit an employer's use of employees' electronic information and would require safeguards to prevent data breaches before they happen.

As it stands, this bill (Senate Bill 6933-B) was introduced and is currently in the Senate rules committee. It does not appear likely that it will reach the floor of the Senate anytime soon. It behooves all of us to reach out to our state legislator to emphasize the importance of the SHEILD act. It must be made a priority.