

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL  
State of California

KAMALA D. HARRIS  
Attorney General

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OPINION	:	No. 12-1101
	:	
of	:	February 13, 2014
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KAMALA D. HARRIS	:	
Attorney General	:	
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MANUEL M. MEDEIROS	:	
Deputy Attorney General	:	
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THE HONORABLE JERRY HILL, MEMBER OF THE STATE SENATE, has requested an opinion on the following question:

Does continuous videotaping surveillance of truck drivers during their on-the-job driving constitute a misdemeanor under Labor Code section 1051 where the video file is inspected by a third party and used as a basis for discipline by the driver's employer?

CONCLUSION

Continuous videotaping surveillance of truck drivers during their on-the-job driving does not constitute a misdemeanor under Labor Code section 1051 where the video file is inspected by a third party and used as a basis for discipline by the driver's employer, provided that the third party is an agent of the driver's employer who is videotaping and inspecting the file for the sole benefit of the driver's employer, and that the file is furnished only to the driver's employer.

## ANALYSIS

We are asked whether Labor Code section 1051<sup>1</sup> is violated by a practice, apparently not uncommon in the commercial and municipal transportation industry, of using video cameras to continuously record the actions of a truck or bus driver. We are informed that such cameras are generally operated by a third party (the system operator), who is under contract with the driver's employer. Typically, the footage is recorded in a continuous loop, overwriting previous footage unless the vehicle undergoes an unusual force such as hard braking, swerving, or a collision. When a triggering event occurs, the camera saves the footage that has been recorded for some set period of time (usually a number of seconds) before and after the event. The video is received by the system operator, who may "code," or mark, the recording for ease of review, and is then made available to the driver's employer for review of the driver's actions before and after the triggering event. The employer is then in a position to use the video file for training or disciplinary purposes.<sup>2</sup>

We are informed that system operators hold these video recordings confidential and make them available only to their client, the driver's employer. We are also informed that, when the video recordings are used for training or disciplinary purposes, the recording is made available to the driver or the driver's bargaining representative.

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<sup>1</sup> Labor Code section 1051 provides:

Except as provided in Section 1057[<sup>1</sup>], any person or agent or officer thereof, who requires, as a condition precedent to securing or retaining employment, that an employee or applicant for employment be photographed or fingerprinted by any person who desires his or her photograph or fingerprints for the purpose of furnishing the same or information concerning the same or concerning the employee or applicant for employment to any other employer or third person, and these photographs and fingerprints could be used to the detriment of the employee or applicant for employment is guilty of a misdemeanor.

<sup>2</sup> See, e.g., DriveCam Program <<http://www.lytx.com/our-solutions/drivecam-program>> (as of February 13, 2014). A description of the system as it is used in transit operations can be found at Litschi, *Video-Based Driver Risk Management Systems: Evaluating Effectiveness at Improving Transit Safety* 5-7 (unpublished research project for master's degree, Mineta Transportation Inst., San Jose State Univ., June 2011) <<http://transweb.sjsu.edu/MTIportal/education/alumni/capstones/video-based-driver-risk-management-systems-transit-safety-Litschi.pdf>> (as of February 13, 2014).

Some have suggested that this practice violates section 1051 because employers are requiring their drivers to submit to having their images recorded by third parties for potential use in disciplinary action. We disagree that this practice violates Labor Code section 1051.

This statute has a particularly interesting history, and one which lends significant support to our conclusion.<sup>3</sup> Section 1051 is rooted in former Penal Code section 653e, an “anti-blacklisting law” that was enacted in 1913.<sup>4</sup> In general, “[t]he legislation prohibited an employer from attempting to prevent a former employee from obtaining employment with any other person by misrepresentation.”<sup>5</sup> In 1928, the State Labor Commissioner recommended that section 653e be amended in a manner relevant to our inquiry:

The blacklisting law (Penal Code, section 653e) should be amended to prohibit the practice of fingerprinting and photographing of employees and applicants for employment for purposes of interfering with their future employment.

It has been found that organizations of employers are requiring all employees employed by their members to go to certain private detective agencies<sup>[6]</sup> to have their fingerprints and photographs taken, with the understanding that no one is to be employed in the particular trade or calling but those men approved by this detective agency. Such a practice is

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<sup>3</sup> Cf. 95 Ops.Cal.Atty.Gen. 102, 110 (2012) (“[I]t is often worthwhile to conduct at least a brief review of the provision’s legislative history, if only to confirm that the record contains nothing contradicting our understanding of the statute’s purpose and effect.”).

<sup>4</sup> Stats. 1913, ch. 350; see 10 Ops.Cal.Atty.Gen. 19, 20 (1947). State blacklisting laws were enacted largely between the years 1887 and 1930 “because employers, in an effort to quash labor organization, created and circulated lists of pro-union workers to prevent them from gaining employment.” (Rothstein, *Wrongful Refusal to Hire: Attaching the Other Half of the Employment-at-Will Rule* (1991) 24 Conn. L.Rev. 97, 110 & fn. 57; see also Saxton, *Employment References in California After Randi W. v. Muroc Joint Unified School District: A Proposal for Legislation to Promote Responsible Employment Reference Practices* (1997) 18 Berkeley J. Emp. & Lab. L. 240, 248.)

<sup>5</sup> 10 Ops.Cal.Atty.Gen., *supra*, at pp. 20-21.

<sup>6</sup> Former First Circuit Judge Calvert Magruder colorfully described them as “that miserable brood of union-smashing detective agencies.” (See Magruder, *A Half Century of Legal Influence Upon the Development of Collective Bargaining* (1937) 50 Harv. L.Rev. 1071, 1117.)

so susceptible of abuse as to be dangerous to the public welfare, and legislation is necessary to combat it.<sup>7</sup>

The following year, the Legislature amended Penal Code section 653e to add the prohibition against compelled photographs or fingerprints, which is now found in Labor Code section 1051.<sup>8</sup> In light of what we know about blacklisting practices, it is evident

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<sup>7</sup> State of California, *Twenty-Third Biennial Rep. of the Bur. of Labor Statistics* 30-31 (1927-1928); cf. *Friedman v. Valentine* (1941) 30 N.Y.S.2d 891, 896 (noting purpose of N.Y. Lab. Code, § 20-a (McKinney), enacted in 1937, “clearly was to prevent private employers from using fingerprinting as a means for blacklisting union leaders and members.”).

<sup>8</sup> Stats. 1929, ch. 586:

Any person, firm or corporation, or officer or director of a corporation, or superintendent, manager or other agent of such person, firm or corporation who, after having discharged an employee from the service of such persons, firm or corporation or after having paid off an employee voluntarily leaving such service, shall by word, writing or other means whatsoever, misrepresent and thereby prevent or attempt to prevent such former employee from obtaining employment with any other person, firm or corporation, *and any person, firm or corporation or agent or officer thereof, who shall require as a condition precedent to securing or retaining employment, that an employee or applicant for employment be photographed or fingerprinted by any person, firm or association which desires his photograph or fingerprints for the purpose of furnishing same or information concerning same or concerning said employee or applicant for employment, to any other employer or third person, which could be used to the detriment of such employee or applicant for employment, shall be guilty of a misdemeanor . . .*

(Emphasis added to highlight insertion.)

The italicized language quoted above was reenacted almost verbatim in 1937, as section 1051 of the newly created Labor Code. (Stats. 1937, ch. 90, p. 211, § 1051.) The balance of Penal Code section 653e was recodified as Labor Code sections 1050, 1052, 1053, and 1054—part of a chapter entitled “Reemployment Privileges.” (Lab. Code, §§ 1050-1057.) Penal Code section 653e was repealed simultaneously with the enactment of the new Labor Code. (Stats. 1937, ch. 90, p. 328.) By the terms of the enactment itself, new Labor Code section 1051 was “to be construed as [a] restatement[] and confirmation[]” of its predecessor statute, “and not as [a] new enactment[.]” (Stats. 1937, ch. 90, at p. 185, ¶ 2.)

from the placement of the new language within existing section 653e that the prohibition against photographs and fingerprints was part of the statute's anti-blacklisting purpose.<sup>9</sup>

We have found no judicial decision interpreting section 1051 or its predecessor statute. But given the provision's historical focus on countering anti-labor conduct, it is not surprising that it fell out of use after the 1935 enactment of the National Labor Relations Act.<sup>10</sup>

This office, however, has previously found occasion to invoke Labor Code section 1051 as a bar against the taking of fingerprints and photographs by an employer for the purpose of furnishing them to a third party. In a 1984 opinion we concluded that, "literally construed," the statute would be violated if the Los Angeles Olympic Organizing Committee were to take the photograph and fingerprints of an employment applicant and deliver them to a law enforcement agency for that agency's use in obtaining and providing criminal history information that could be used by the Committee to deny employment.<sup>11</sup> However, we regard that conclusion as a narrow one, and not generally applicable in other situations.

Importantly, the opinion noted that section 1051's limitation on the use of fingerprints and photographs would not prevent the Olympic Committee from obtaining the safety clearances it required, because Labor Code section 432.7 specifically allowed for the performance of criminal background checks and clearances for prospective Olympics employees and concessionaires, and because identifying information other than photographs and fingerprints (such as name, address, birth date, birth place, social

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<sup>9</sup> See *In re Alex N.* (2005) 132 Cal.App.4th 18, 23, quoting *People v. Murphy* (2001) 25 Cal.4th 136, 142 ("We do not . . . consider the statutory language "in isolation." . . . . We must harmonize the various parts of a statutory enactment . . . by considering the particular clause or section in the context of the statutory framework as a whole.")

<sup>10</sup> 29 U.S.C. §§ 151 et seq.; see e.g., *Elsis v. Evans* (1960) 185 Cal.App.2d 610 (injunction based on facts implicating Labor Code section 1050 preempted by NLRA); Rothstein, *supra*, 24 Conn. L.Rev. at p. 110.

<sup>11</sup> See 67 Ops.Cal.Atty.Gen. 23, 26 (1984) ("Literally construed, Labor Code section 1051 would appear to prohibit 'any person,' including the employer, from taking a photograph and fingerprints 'for the purpose of furnishing the same . . . to any . . . third person,' including a law enforcement agency . . ."); cf. 10 Ops.Cal.Atty.Gen. 19, 20 (1947) ("An employer may require photographs and fingerprints of an employee for his own use and to obtain information concerning such employee. The prohibition, in general, is against furnishing such information to another employer or third person.").

security number, etc.) could be used for that purpose.<sup>12</sup> Furthermore, the opinion noted that the Legislature had already carved out a number of specific exceptions to this limitation on the use of photographs and fingerprints for the purposes of background checks, such as in the banking context.<sup>13</sup> Our opinion concluded that, if the Legislature had intended for fingerprints and photographs to be used to obtain background checks for Olympics personnel, it could have (but did not) do so.

Thus, we approach the question here with an understanding that Labor Code section 1051 does not stand as a universal or insuperable barrier to the use of photographs or fingerprints for ensuring safety in the workplace. Instead, although not entirely a dead letter, it may be fairly characterized as an outdated statute from which the Legislature has often seen fit to part ways. In this case, the photographer is not the employer itself, but the employer's agent—the system operator—who is under contract with the employer regarding both the recording of the images and the subsequent use of the images. Here, both the employer and the system operator desire the images for the purpose of *returning the image to the employee's own employer*. The statute, by contrast, prohibits the taking of fingerprints and photographs “for the purpose of furnishing the same . . . to any other employer or third person.” Accordingly, even assuming that a photograph and videotape are equivalent for purposes of section 1051,<sup>14</sup> we conclude there is no violation under the plain terms of the statute under the circumstances that have been conveyed to us.<sup>15</sup>

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<sup>12</sup> See 10 Ops.Cal.Atty.Gen., *supra*, at pp. 26-27.

<sup>13</sup> See 10 Ops.Cal.Atty.Gen., *supra*, at p. 27; see also, e.g., Bus. & Prof. Code, § 144 (criminal background checks for various business and professional licenses); Corp. Code, § 25221 (for broker-dealer license); Ed. Code, § 87103 (for community college employment); Health & Saf. Code, § 1265.5 (for employment in various kinds of care facilities); Health & Saf. Code, § 1736.6 (for home health aides); Health & Saf. Code, §§ 1596.603-1596.67 (trustline registration for child care providers); Pen. Code, § 11102.1 (certification of persons who roll fingerprints for criminal background checks).

<sup>14</sup> Because our conclusion rests on broader grounds, we need not decide whether a photograph and a videotape are equivalent for purposes of section 1051. We note, however, that when the Legislature has intended to encompass both photographs and videotapes within a statute's coverage, the Legislature has generally said so specifically. (See, e.g., Pen. Code, § 422.4, subd. (b)(4) (publishing information about an academic researcher with intent that another use the information to commit a crime against the researcher); see also, e.g., Bus & Prof. Code, § 22952, subd. (d)(2); Civ. Code, § 3344, subd. (b); Code Civ. Proc., § 129; Ed. Code, § 8971, subd. (e); Lab. Code, § 1700.2., subd. (b)(3); Pen. Code, § 11165.1, subd. (c)(3); cf. Civ. Code, § 1708.8, subds. (a)-(c) (“any type of visual image”).)

<sup>15</sup> Cf. 10 Ops.Cal.Atty.Gen., *supra*, at p. 19 (employer may require photographs and

Construing the statute consistently with the Legislature’s anti-blacklisting intent—and assuming that a videotape is equivalent to a photograph for these purposes—we conclude that section 1051 is not violated when an employer requires on-the-job videotaping of its employees for the employer’s own use.<sup>16</sup>

We find further support for our conclusion from recent amendments to section 26708 of the Vehicle Code, a statute which generally prohibits the placement of anything on the windshield or rear-view mirror of a vehicle, but makes an exception for a “video event recorder with the capability of monitoring driver performance to improve driver safety.”<sup>17</sup> In 2012, the Legislature amended Vehicle Code section 26708 to expressly extend the video event recorder exception to commercial vehicles.<sup>18</sup> This amendment

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fingerprints of an employee for his own use, such as to obtain background information concerning the employee).

<sup>16</sup> If the third-party contractor had an additional purpose of furnishing the videotape to someone other than the employer, or if the employer had an additional purpose of subsequently furnishing the videotape to another employer and the tape “could be used to the detriment of” the employee, our conclusion might be different. But we have not been presented with facts indicating such an additional purpose.

<sup>17</sup> Veh. Code, § 26708, subd. (b)(13)(A).

In response to privacy objections by the American Civil Liberties Union, the original bill was amended to specify that, to qualify for the exemption, “[t]he data recorded to the device is the property of the registered owner or lessee of the vehicle.” (Assem. Bill No. 1942 (2009-2010 Reg. Sess.) as amended Aug. 2, 2010) see Assem. Floor, Analysis of Assem. Bill No. 1942 (2009-2010 Reg. Sess.) as amended Apr. 27, 2010, 3d reading (Apr. 28, 2010) at p. 3; see also Veh. Code, § 26708, subd. (b)(13)(E).)

In response to objections by the Teamsters Union, the original bill was amended to add two further specifications: first, that “[v]ideo event recorders shall store no more than 30 seconds before and after a triggering event”; and second, that “[w]hen a person is driving for hire as an employee in a vehicle with a video event recorder, the person’s employer shall provide unedited copies of the recordings upon the request of the employee or the employee’s representative. These copies shall be provided free of charge to the employee and within five days of the request.” (Assem. Bill No. 1942 (2009-2010 Reg. Sess.) as amended Aug. 2, 2010; see Sen. Transportation and Housing Com., Analysis of Assem. Bill No. 1942 (2009-2010 Reg. Sess.) as amended Feb. 17, 2010 (June 22, 2010) at p. 3; see also Veh. Code, § 26708, subd. (b)(13)(F).)

<sup>18</sup> Veh. Code, § 26708, subd. (b)(14); Stats. 2012, ch. 375 (Assem. Bill No. 2477), § 2.

brought California law into alignment with federal motor safety regulations, which exempt such devices from the federal prohibition against driver-view obstructions.<sup>19</sup>

Highway safety was the Legislature’s motivation in permitting the mounting of a video event recorder on the windshield or rear window of a vehicle.<sup>20</sup> There is no question that the Legislature understood that video event recorders would be used to videotape employee-drivers. Moreover, the Legislature was aware that employers might use third-party contractors to carry out the videotaping operations.<sup>21</sup> In fact, the bill analyses list two such companies—DriveCam, Inc. and SmartDrive Systems—as co-sponsors of the 2012 amendments to section 26708.<sup>22</sup> Indeed, the federal exemption that was the basis for the 2012 amendment<sup>23</sup> was itself granted by the Federal Motor Carrier

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<sup>19</sup> Stats. 2012, ch. 2477, § 1; see 49 CFR 393.60(e)(1) (prohibition); 76 Fed. Reg. 21791-01 (Apr. 18, 2011) (exemption).

<sup>20</sup> Stats. 2012, ch. 375, § 1; see Assem. Com. on Transportation, Analysis of Assem. Bill No. 1942 (2009-2010 Reg. Sess.) as introduced (Feb. 17, 2010) at p. 2; Sen. Floor, Analysis of Assem. Bill No. 1942 (2009-2010 Reg. Sess.) as amended Aug. 2, 2010, 3d reading (Aug. 10, 2010) at p. 4.

<sup>21</sup> The statute reflects an understanding that these contractors act only for the benefit of the employer. For example, the data is declared to be the property of the registered owner or lessee of the vehicle. (Veh. Code, § 26708, subd. (b)(13)(E).) Further, “the registered owner or lessee of the vehicle may disable the device.” (Veh. Code, § 26708, subd. (b)(13)(D).)

<sup>22</sup> Assem. Com. on Transportation, Analysis of Assem. Bill No. 2477 (2011-2012 Reg. Sess.) as introduced (Apr. 16, 2012) at p. 4; Sen. Transportation and Housing Com., Analysis of Assem. Bill No. 2477 (2011-2012 Reg. Sess.) as amended Apr. 23, 2012 (June 26, 2012), at p. 4.

The analysis of the Senate Republican Fiscal Office includes these comments: “Nationwide, this technology is deployed in well over 200,000 vehicles. Two California-based companies, DriveCam and SmartDrive, are the leaders in this market.” (Sen. Republican Fiscal Off., Analysis of Assem. Bill No. 2477 (2011-2012 Reg. Sess.) as amended June 28, 2012, at p. 3.) In determining legislative intent, we may consider bill analyses prepared by the staff of legislative committees. (*Baker v. American Horticulture Supply, Inc.* (2010) 186 Cal.App.4th 1059, 1074.) And the views of a bill’s sponsor may be relevant in ascertaining legislative intent. (See e.g., *In re Marriage of Fellows* (2006) 39 Cal. 4th 179, 189; *Internat. Assn. of Firefighters Local Union 230 v. City of San Jose* (2011) 195 Cal.App.4th 1179, 1203.)

<sup>23</sup> See Stats. 2012, ch. 375, § 1.

Safety Administration at the request of DriveCam, Inc.<sup>24</sup> Both DriveCam, Inc. and SmartDrive Systems are major providers of videotaping systems for commercial vehicles.<sup>25</sup>

We presume that the Legislature was aware of all of its statutes, including Labor Code section 1051, when it amended Vehicle Code section 26708 to permit videotaping systems in commercial vehicles.<sup>26</sup> Because Labor Code section 1051 is nowhere mentioned in any of the bill analyses for either the 2010 or 2012 amendments of Section 26708, it is reasonable to infer that the Legislature believed section 1051 had no application to the videotaping of an employee-driver for use by the driver's employer in furtherance of highway safety.<sup>27</sup> That is our belief, as well. Any superficial disharmony between the two statutes is easily dispelled by declining to extend Labor Code section 1051 beyond its narrow confines.<sup>28</sup>

We therefore conclude that continuous videotaping surveillance of truck drivers during their on-the-job driving does not constitute a misdemeanor under Labor Code section 1051 where the video file is inspected by a third party and used as a basis for discipline by the driver's employer, provided that the third party is an agent of the driver's employer who is videotaping and inspecting the file for the sole benefit of the driver's employer, and that the file is furnished only to the driver's employer.

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<sup>24</sup> See 76 Fed. Reg. 21791-01 (Apr. 18, 2011); see also 78 Fed. Reg. 17750-01 (Mar. 22, 2013) (renewing exemption).

<sup>25</sup> We are informed that DriveCam, SmartDrive, or similar systems are used in California by many commercial operations and at least one municipal transportation agency.

<sup>26</sup> See, e.g., *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 298.

<sup>27</sup> To conclude otherwise would require us to find that the enactment of Vehicle Code section 26708, subdivisions (b)(13) and (b)(14) effected an implied repeal of Labor Code section 1051 in the context of third-party videotaping by use of devices compliant with those Vehicle Code exemptions. But "[a]ll presumptions are against a repeal by implication." Absent an express declaration of legislative intent, we will find an implied repeal 'only when there is no rational basis for harmonizing two potentially conflicting statutes, and the statutes are 'irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.'" (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 805 (citations and internal quotation marks omitted).)

<sup>28</sup> Cf., *Nickelsberg v. Workers' Comp. Appeals Bd.*, *supra*, 54 Cal.3d at p. 298.