

# A Hint of Change: NLRB Allows Employer to Defend Blanket Prohibition on Use of Cameras/Video Recording Devices

## Labor & Employment Law Update

By Beverly Alfons on May 16, 2017

Recently, there has been much discussion about the composition of the five-member board in Washington, D.C., including President Trump's appointment of Philip Miscimarra as National Labor Relations Board (NLRB) Chairman, and the expected shift from pro-labor initiatives – especially in light of the expiring term of the NLRB General Counsel who was appointed by President Obama. The NLRB recently issued an order that may be a sign of things to come.

On May 5, a divided NLRB denied the NLRB General Counsel's motion for summary judgment (a request for judgment as a matter of law where there are no disputed facts) against Mercedes-Benz. *Mercedes-Benz U.S. International, Inc. (MBUSI)*, 365 N.L.R.B. No. 67 (May 5, 2017). The General Counsel argued that legal precedent clearly establishes that a company rule prohibiting any use of cameras and video recording devices without prior authorization interferes with employees' rights to engage in union or protected concerted activity. The General Counsel relied upon the NLRB decisions in *Whole Foods Market*, 363 NLRB No. 87, slip op. at 3-5 (Dec. 24, 2015) (in which a similar rule was found unlawfully overbroad) and *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 3-5 (April 29, 2016) (same). These decisions state that blanket bans on workplace photography and recordings generally violate the Act.

Mercedes-Benz argued that it should be allowed to show that employees did not interpret the rule to restrict protected activity under the National Labor Relations Act (NLRA) and that the rule furthers legitimate business interests, including the protection of proprietary and confidential information, the maintenance of safety and production standards, and open communication. These are nearly identical to the arguments that the board rejected in *Whole Foods Market*. However, this board majority, including Chairman Miscimarra, agreed that the employer should be allowed to present their evidence at a hearing. Interestingly, they relied upon two decisions in which the employer was ultimately found to have violated the NLRA, including the *Whole Foods Market* decision.

**Bottom line:** This NLRB order is notable because it shows some flexibility from the NLRB as to work rules and legitimate business interests – in contrast to recent decisions that many viewed to curb management rights. Ultimately, however, the law has not changed (yet) and the *Whole Foods Market* decision remains intact. Therefore, before disciplining an employee for taking photos or making recordings in the workplace, you must consider whether the employee's actions constitute protected activity under the NLRA. Employer policies should remain carefully tailored to specify the restrictions and the business reasons for them. We will be monitoring the developments in this case. Stay tuned.

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