

NLRB Strikes Down Employee Handbook's No-Recording Rules

Labor & Employment Law Update

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The NLRB has, once again, struck down work rules the Board deemed overly broad. This time, the employer is Whole Foods Market, and the rules at issue essentially barred employees from photographing or making audio or video recordings during working hours—that is, when employees were being paid to do their assigned work. These rules did not apply while employees were on break.

Readers may remember that the NLRB's rationale for striking down various employer policies in recent years has hinged on protecting employees' rights under the National Labor Relations Act to engage in "concerted activity for mutual aid or protection." For example, the NLRB has struck down rules barring employees from discussing their wages because those discussions, in the NLRB's eyes, are concerted activity protected by law.

Now, no employee was actually disciplined for violating the rules at issue in this most-recent case—and there is no accusation that the rules *actually* infringed on any employee's right to engage in concerted activity for mutual aid or protection. There also was no evidence that any employee even *believed* that the rules prohibited protected concerted activity. Nevertheless, the NLRB felt it necessary to ban these rules based on the possibility that employees *might* believe the rules prohibited the recording of, for instance, picketing or unsafe working conditions—things that may generally be considered protected concerted activity.

One of the more interesting aspects of the decision, aside from the fact that no one was harmed by the rules at issue, is that the NLRB dodged the issue of whether the rules would be enforceable in states in which at least some of the prohibited recording is illegal under state law. Whole Foods argued that in some of the states in which it does business, it is illegal to record a private conversation without the consent of the parties involved in the conversation. The NLRB, apparently having no interest in issuing a decision with any nuance, rejected that argument (with no acknowledgement of the irony) because such laws were not in effect in all of the states in which Whole Foods operated.

Also interesting is the fact that the NLRB did not overrule prior precedent in which no-camera rules were upheld in a hospital setting. The rationale for that prior precedent was essentially that the privacy of hospital patients and their medical information outweighed potential concerns over employees' protected concerted activity.

With all of that in mind, it is likely that some no-recording rules could survive NLRB scrutiny. The key to drafting enforceable rules will be making them apply to a narrow set of circumstances—circumstances that, ideally, are already protected by existing laws on consent for recording, or which can be tied to significant privacy interests, like medical patient privacy or, perhaps, the protection of trade secrets—although the NLRB's decision is unclear as to whether the protection of trade secrets would be a valid basis for a no-recording rule.

The bottom line is that employers implementing broad no-recording policies that could be misconstrued to cover protected employee activity face a considerable risk that those rules will be deemed unenforceable by the NLRB. As such, we recommend that employers work closely with experienced legal counsel to craft no-recording rules that closely align with operational needs and other applicable laws, and at the same time make clear that the rules will not infringe on employees' rights under the National Labor Relations Act.

Finally, we note in closing that Whole Foods appealed this decision to the U.S. Court of Appeals for the Second Circuit on January 5, 2016. We will monitor that action closely, and provide updates here with any further information as it becomes available.

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