Insight

IN-DEPTH DISCUSSION

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Workplace Recording Bans and the NLRA: Are "No-Recording" Policies Still Allowed?

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The ubiquity of smartphone applications ("apps") that record audio and/or video – coupled with the risk of workplace discussions being uploaded to social media for all to hear – has led many employers to implement "no-recording" policies that prohibit employees from recording workplace interactions. It may come as a surprise to many employers, especially non-union employers, that a law from the 1930s, the National Labor Relations Act ("NLRA" or the "Act") has recently been construed to generally prohibit broad bans on workplace recordings. In a recent decision addressing a company's no-recording policy, the National Labor Relations Board ("NLRB" or "the Board") held that such bans unlawfully interfere with the rights of employees – unionized or not – to engage in concerted activity regarding their terms and conditions of employment.

While the case is currently on appeal to the U.S. Court of Appeals for the Second Circuit, employers may want to use the Board's decision, and the analysis below, to reevaluate their no-recording policy in light of the Board's continued attack on relatively common workplace policies.

Employer's Ban on Unauthorized Recordings Initially Considered Permissible

The Board's analysis in *Whole Foods Market, Inc.,* 363 NLRB No. 87 (2015) centered on two rules in the company's General Information Guide ("GIG"), distributed to all employees. The first rule generally banned all audio and video recordings in the workplace without the consent of a supervisor or all parties to the conversation. The company explained in the policy that it had been implemented "to encourage open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust." The second rule prohibited recording without the consent of a manager "to eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded."

At the hearing before an administrative law judge ("ALJ"), the company's global head of human resources explained that the company's "core values" and "culture" permit employees to "speak up and speak out" about both work-related and non-work related issues. As explained during the hearing, the company fosters this culture by scheduling a range of employee meetings during which employees can discuss everything from store management to store sales strategies. Allowing concealed recordings would undermine these core values and the company's culture.

Based on this testimony, the ALJ found that the company's general ban on recording without either the consent of a manager or of all parties to the communication was lawful. The ALJ reasoned that "making recordings in the workplace is not a protected right," and in any event, no reasonable employee would read the policy to prohibit protected activity because the policy's stated purpose was to encourage candid discussions in the workplace by eliminating concern over concealed recordings.

The Board Rules that Blanket Bans on Workplace Recordings Generally Will Violate the Act

The Board rejected the ALJ's conclusion that recording in the workplace is not a protected right. The Board held: "[p]hotography and audio or video recording in the workplace, as well as the posting of photographs and recordings on social media, are protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present." The Board pointed to examples of workplace recordings by employees that are protected, such as images of protected picketing; documentation of unsafe workplace equipment or hazardous working conditions; and recordings that preserve evidence for use in administrative or judicial forums in employment-related actions. The Board also cited to its own precedent in which surreptitiously recorded workplace interactions were admitted into evidence.

Having established this new protected right, the Board reversed the ALJ's decision. The Board ruled that the company's ban on workplace recordings violated employees' Section 7 rights. In support of this conclusion, the Board relied on the head of HR's testimony that the no-recording rules covered all recording, regardless of whether the recording captured activity protected under Section 7 and also regardless of whether recordings were made during working or non-work time. According to the Board, employees reasonably would construe the broad, all-encompassing rules to prohibit recording activity that would be protected by Section 7.

Notably, the Board considered the company's policy as one that established a total ban on recording even though the policy permitted recording with management approval. The Board reasoned, "any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee's free time and in non-work areas is unlawful."

The Board rejected the company's justifications for its no-recording policy. The Board held that the company's interest in promoting open discussion and dialogue did not outweigh employees' rights under Section 7. The Board also gave short shrift to the company's argument that its recording ban was justified by the fact that nonconsensual recording is unlawful in many of the states where the store operates. The Board noted that the company's rules did not reference any state laws and did not specify that the recording ban was limited to recording that does not comply with state law.

Although the Board rejected these justifications, the Board recognized that employers may be able to justify restrictions on unauthorized workplace records. In this regard, the Board stated: "we do not hold that an employer is prohibited from maintaining any rules regarding recording in the workplace. We hold only that those rules must be narrowly drawn, so that employees will reasonably understand that Section 7 activity is not being restricted."

An Employer's Ban on Workplace Recordings May Be Upheld if the Employer Can Demonstrate an Overriding Interest

The Board concluded its opinion by rejecting the company's contention — in reliance on *Flagstaff Medical Center,* 357 NLRB No. 65 (2011) — that the company's interest in protecting employee privacy justified the no-recording ban. In Flagstaff, the Board ruled that a hospital's policy prohibiting the recording of images of patients, hospital equipment, property or facilities was lawful because "the privacy interests of hospital patients are weighty," and the hospital had a "significant interest in preventing the wrongful disclosure of individually identifiable health information." Seeking to draw parallels with *Flagstaff*, Whole Foods pointed to its employees' privacy interests in "personal and medical information about team members, comments about their performance, details about their discipline, [and] criticisms of store leadership" as well as the company's interest in protecting its confidential business strategies and trade secrets.

The Board acknowledged that these justifications were "not without merit." However, the Board concluded, without providing supporting explanation, that these business justifications were "not nearly as pervasive or compelling" as the patient privacy interests in *Flagstaff*.

Takeaways for Employers

The Board's decision in *Whole Foods Market* provides the following useful takeaways for employers to consider:

1. The Board generally will reject a total ban on workplace recordings and even a ban on unauthorized recordings. Consequently, for most employers, a policy on recording should be narrowly tailored to prohibit the recording only of information that is not protected under Section 7, such as information about customers, vendors or suppliers, or information that the employer has an overriding interest to protect, such as corporate trade secrets.
2. Employers can include in any no-recording policy a statement explaining the business justifications for the restrictions on recording. However, as demonstrated in Whole Foods, such a policy statement by itself will not save a workplace recording rule deemed overbroad.
3. Employers in states with laws prohibiting nonconsensual recordings should reference the controlling state law in their workplace recording policy.
4. The policy should be limited to recordings during work time, while in work areas, or while conducting the employer's business. Even then, however, the distinction between work time/work area and non-work time/non-work area may not be respected by the Board. In justifying its decision, the Board implies that surreptitious recordings of workplace meetings may be permissible so long as that recording is done for purposes of protected, concerted activity. While the Board did not expressly make such a determination in *Whole Foods*, such a possibility is certainly a potential next step for the Board. Consequently, employers who make such a work/non-work distinction in their policies should be aware that this distinction alone may not be enough to avoid a legal problem.
5. To be covered by the NLRA, protected activity must also be concerted and involve a term or condition of work. On some occasions, employees may record a conversation regarding a situation that involves only that employee. Such a recording would not normally be protected by the NLRA unless it also relates to some type of concerted activity. Similarly, if a recording was a bad joke or meant to harass a co-worker, the activity should be unprotected because it does not involve a term of condition of work.
6. Employers should consult with counsel before disciplining an employee for recording a workplace conversation or interaction.
7. The Board continues to closely scrutinize employer workplace policies. In view of this, employers should draft workplace policies to clearly convey that the policy is not intended to infringe upon an employee's Section 7 rights.