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Labor & EMPLOYMENT

Don't hit pause on recording workplace conversations

In yet another blow to common-sense workplace rules, the National Labor Relations Board recently invalidated a Whole Foods Market policy prohibiting employees from recording conversations, phone calls, images or company meetings. *Whole Foods Market, Inc., 363 N.L.R.B. No. 87* (Dec. 24, 2015). Whole Foods defended its policy primarily on the grounds that it encouraged open dialogue in its town hall meetings, where regional management met with employees without their direct supervisors present, in part to hear employee complaints about store managers. Despite the argument by Whole Foods, the NLRB held that the policy violated the National Labor Relations Act because employees would reasonably interpret it as prohibiting them from engaging in activity protected by Section 7 of the act, which guarantees employees the right to engage in concerted activity for their mutual aid and protection. As a result of the NLRB's decision, employers with similar policies face the prospect of the NLRB finding them unlawful and should consider revising them to comply with the *Whole Foods* decision.

Background

Generally speaking, it is illegal to surreptitiously record a conversation without the consent of the parties involved. In New York State, however, only one party to the conversation needs to give consent for the recording to be legal. *N.Y. Penal Law § 250.00(2)*. This is the case in the majority of states, although a significant number require the consent of all parties. The rule in New York means that the consent of the party recording the conversation is sufficient to bring a recording outside of the statute. An employee, therefore, may record conversations at work without implicating the statute.



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Prior opinions

Prior to the *Whole Foods* decision, the NLRB's general counsel issued a memorandum dated March 18, 2015, that summarized the landscape at that time, stating that employees have a right "to photograph and make recordings in furtherance of their protected concerted activity" and that bans of all recordings "are unlawfully overbroad where they would reasonably be read to prohibit the taking of pictures or recordings on non-work time." In *Flagstaff Medical Center, 357 NLRB No. 65*, slip op. at 5 (Aug. 26, 2011), enforced in relevant part, *715 F.3d 928* (D.C. Cir. 2013), the NLRB held that a rule restricting photography was permissible because it protected a strong privacy interest. In that case, the employer was a medical center, and the interest was protecting patients' confidential information. Given the clear privacy interests at stake, the NLRB held that employees would not reasonably understand the rule as prohibiting protected concerted activity.

A series of earlier NLRB decisions also implied that rules prohibiting recording would not violate the act, though they did not directly address the issue. The landscape thus seemed to indicate that

employers had the discretion to prohibit employees from recording conversations at work, so long as the rule was nondiscriminatory, served legitimate purposes, and did not specifically inhibit protected concerted activity.

The Whole Foods decision

In the *Whole Foods* decision, the company's employee handbook prohibited employees from "record[ing] conversations . . . unless prior approval is received." The rationale for the rule was also stated in the handbook, providing "[t]he purpose of this policy is to eliminate a chilling effect to the expression of views," to ensure that "spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed" is not stunted.

In 2013, an administrative law judge for the NLRB held that the rules did not violate the right to engage in protected concerted activity under the act, holding that making recordings in the work place is not a protected act. The law judge held that because the rules do not prohibit the conversations themselves, or recording conversations by writing them down, the rules could not be reasonably interpreted as preventing participating in protected activity. The decision noted that there was no evidence that the rules were promulgated in response to union activity, or that they had been applied to restrict the exercise of Section 7 rights.

The administrative law judge's decision was largely based on the determination that the rules were created to protect a legitimate interest. The company explained that employees regularly participate in meetings in which they are asked to provide input regarding the strength of management, of coworkers, or even to discuss

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and determine whether a coworker's request for financial assistance due to some hardship should be granted. The company therefore asserted that the rule is necessary both to encourage open dialogue and to protect privacy.

The NLRB's December 2015 decision held that the rules are unlawful, because they would "reasonably be construed by employees to prohibit Section 7 activity." Recording in the workplace, as well as sharing the recordings, is protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. The NLRB explained that the ability to record images such as unsafe working conditions or inconsistent application of employer rules can be integral to ensuring employers behave lawfully, and that recording at the workplace is therefore protected under certain circumstances.

The NLRB explicitly stated that not all rules prohibiting recording are invalid, but only where they would be reasonably read by employees to prohibit protected concerted action. More specifically, the board explained that the rules must be "narrowly drawn." The company contended that the rules were lawful because nonconsensual recording is unlawful in many of the states in which it operates; the NLRB ruled, however, that argument was of no effect because the rules are not limited to those states, and

they do not refer to those laws and do not specify that the restrictions are limited to recording that violates state law.

The NLRB distinguished this case from *Flagstaff*, writing that the rule in *Flagstaff* was lawful because of the important privacy interests in ensuring patient information remains confidential, whereas in *Whole Foods*, the interest in protecting personal information about employees, their performance, discipline, and confidential business strategy and trade secrets was not sufficient to justify unqualified rules against recording. Further, in *Whole Foods*, confidential or sensitive information was shared in very limited circumstances, but the rules applied too broadly, to all times an employee is on the job.

Advice to employers

If an employer plans to promulgate a rule forbidding employees from recording, it must tailor the rule as narrowly as possible. For instance, in *Whole Foods*, it appears the company would have been more successful in defending its rules if the rules only applied during the meetings where sensitive information was often shared, as opposed to whenever employees were on the job. Further, the interests the employers are seeking to protect should be important; the rule will be more likely to succeed where it serves to protect defined interests, as in the health care setting to protect patient information. Last, if an employer operates at least partially in two-party consent

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states, it can provide in its rule that employees are prohibited from recording to the extent prohibited by state law, which will further prevent surreptitious recording in states where the consent of all parties is required.

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