



This Conversation May be Recorded

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THIS CONVERSATION MAY BE RECORDED – CAN YOU PROHIBIT EMPLOYEES FROM SECRETLY RECORDING CONVERSATIONS?

By: Leah M. Stevens-Block

I. OVERVIEW

The prevalence of emerging smartphone applications 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. However, in a recent decision addressing a company’s no-recording policies, the National Labor Relations Board (NLRB) held that policies requiring management approval to record could prevent employees from engaging together in workplace activities protected by the National Labor Relations Act. Although the case is currently on appeal to the U.S. Court of Appeals for the Second Circuit, employers may want to use the NLRB’s decision to reevaluate their employee handbooks in light of the Board’s continued attack on relatively common workplace policies.

II. BACKGROUND

The National Labor Relations Act (NLRA) was passed in 1935 and governs labor relations in private companies. The NLRA generally gives employees the right to join a union, engage in collective bargaining through a union, and engage in other “protected concerted activities.” What many private companies don’t realize is that the NLRA applies to both unionized and non-unionized workplaces. With few exceptions, the NLRA applies to all employers involved in interstate commerce, which generally means every company. As such, the NLRA protects the rights of all non-management employees, union and non-union, to discuss and to complain about wages, hours, and other terms and conditions of employment.

The NLRB was created to police employment relationships and to protect employees from unfair labor practices. In recent years, the NLRB has emerged to be a force to be reckoned with for non-unionized workplace. The NLRB has taken aggressive steps affecting non-union employers by striking down employee policies seen as “chilling” or restricting non-union employees’ right to engage in protected activity. For example, the NLRB has been particularly harsh on employee policies that may be construed to prohibit discussions of terms and conditions of employment. Policies held to limit such discussions have included overly-restrictive confidentiality rules, social media policies and, most recently, employee policies prohibiting recordings in the workplace. Understanding the NLRB’s guidance with respect to these issues can provide a useful roadmap for crafting lawful employee policies.

III. WORKPLACE RECORDING BANS

The NLRB’s recent decision regarding workplace recordings centered on two rules in Whole Foods Market’s General Information Guide, which was distributed to all employees. The first rule generally banned all audio and video recording in the workplace without the consent of a supervisor and all parties to the conversation. The policy explained that the prohibition was 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.”

During a preliminary hearing challenging Whole Foods’ no-recording policies, an administrative law judge ruled that a general ban on recording without either the consent of a manager or all parties to the communication was lawful. There, the judge reasoned that making

recordings in the workplace was not a protected right and that 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 NLRB rejected the administrative judge's conclusion that recording in the workplace is not a protected activity. The Board held that photography and audio or video recording in the workplace, as well as the posting of photographs and recordings on social media, are protected by the NLRA if employees are doing so in order to collectively raise concerns about their conditions of employment. The NLRB pointed to examples of workplace recordings by employees that are protected, such as images of 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. Having established this new protected right, the Board reversed the administrative law judge's decision and ruled that the company's ban on workplace recordings violated the NLRA.

Notably, the Board rejected Whole Foods' justification for its no-recording policies and considered the policies to establish a total ban on recording, even though the policies permitted recording with management approval. However, the Board did recognize that employers may be able to justify restrictions on unauthorized workplace recordings if the rules are narrowly drawn and employees can reasonably understand that NLRA protected activity is not being restricted.

IV. TAKEAWAYS FOR EMPLOYERS

The NLRB's decision regarding workplace recordings provides the following useful takeaways for employers to consider:

- The Board will generally reject a total ban on workplace recordings and even a ban on unauthorized recordings. Consequently, for most employers, a policy on recording in the workplace should be narrowly tailored to prohibit the recording only of information that the employer has an overriding interest in protecting, such as corporate trade secrets.
- Employers can include in any no-recording policy a statement explaining the business justifications for the restrictions on recording. However, such policy statement by itself will not save a workplace recording rule deemed overbroad.
- New Mexico allows non-consensual recordings; therefore, the controlling state law cannot support an overly-broad workplace recording rule.
- 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 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 also be considered unprotected because it does not involve a condition of work.
- Employers should consult with counsel before disciplining an employee for recording a workplace conversation or interaction.
- The NLRB continues to closely scrutinize employer workplace policies. In view of this, employers should draft workplace policies to clearly convey that the policies are not intended to infringe upon an employee's NLRA rights.

The NLRB's decision regarding workplace recordings illustrates the challenges that employers face as employees more frequently utilize smartphones and social media to communicate with employees and publicize workplace grievances. Moreover, its decision confirms that employee handbooks and other workplace policies will continue to remain in the middle of the NLRB's radar for the foreseeable future. It is essential for employers to understand how they can lawfully respond. Although this is often a complex question, NLRB decisions such as this one can provide a useful roadmap for properly drafting employment policies that accomplish their objectives, while at the same time surviving the NLRB's scrutiny.

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