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CLIENT E-NEWSLETTER

SPECIAL BULLETIN

National Labor Relations Board Held that Rules Banning Employees From Recording Meetings and Workplace Conversations Were Unlawfully Overbroad and Violated the NLRA

On December 24, 2015, the National Labor Relations Board (NLRB), in *Whole Foods Market, Inc.*, Case No. 01-CA-096965, 363 NLRB No. 87, addressed internal policies prohibiting employees from using phones, digital cameras, or any other audio-visual equipment to record company meetings and workplace conversations without management's explicit permission. The Board found, in a two to one decision, that employees could reasonably construe these policies as prohibiting Section 7 activity and that the policies therefore violated Section 8(a)(1) of the National Labor Relations Act ("NLRA").

The employer, Whole Foods Market, is a large high-end chain of grocery stores. Whole Foods had implemented two separate policies prohibiting recording in its General Information Guide ("GIG"). One provided:

In order to encourage open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust, [employer] has adopted the following policy concerning the audio and/or video recording of company meetings:

It is a violation of [employer] policy to record conversations, phone calls, images or company meetings with any recording device (including but not limited to a cellular telephone, PDA, digital recording device, digital camera, etc.) unless prior approval is received from your Store/Facility Team Leader, Regional President, Global Vice President, or a member of the Executive Team, or unless all parties to the conversation give their consent. Violation of this policy will result in corrective action, up to and including discharge.

Another provided:

It is a violation of [employer] policy to record conversations with a tape recorder or other recording device (including a cell phone or any electronic device) unless prior approval is received from your store or facility leadership. The purpose of this policy is 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. This concern can inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed.

An Administrative Law Judge ("ALJ") who addressed the two policies found that the policies did not explicitly restrict Section 7 activity because they did not "prohibit employees from engaging in protected, concerted activities, or speaking about them," and because "[m]aking recordings in the workplace is not a protected right." Noting that Whole Foods had not promulgated the rule in response to union activity or

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applied it to restrict the exercise of employees' Section 7 rights, the ALJ further found, based in part on the rules' own statement of the purpose therefore, that the rules "cannot reasonably be read as encompassing Section 7 activity."

However, the Board disagreed, recognizing that, based on *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190 (2015), photography 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 further recognized that NLRB "case law is replete with examples where photography or recording, often covert, was an essential element in vindicating the underlying Section 7 right" and found, therefore, that photography and audio and video recording at the workplace are protected under certain circumstances.

Turning to the specific text of the two rules, the Board found that the rules were overly broad and could be interpreted to prohibit Section 7 activity as the rules did not differentiate between recordings protected by Section 7 and those that are unprotected. Therefore, the Board held that the rules could reasonably chill the exercise of Section 7 rights. Further, in a footnote, the majority claims that its decision does not render invalid all rules regulating recording: "[W]e do not hold that an employer is prohibited from maintaining any rules regulating recording in the workplace. We hold only that those rules must be narrowly drawn, so that employees will reasonably understand that Sec. 7 activity is not being restricted." The decision, however, does not give any guidance on how a rule prescribing recording could be drafted to avoid restricting or discouraging Section 7 activity.

The Board also found that the ruling in *Flagstaff Medical Center*, 357 NLRB No. 65 (2011), enforced in relevant part 715 F.3d 928 (D.C. Cir. 2013), in which a Board majority found that an employer policy that prohibited the use of cameras for recording images in a hospital setting did not violate the Act was inapplicable, as there were specific patient privacy concerns and HIPAA requirements implicated that justified the prohibition on recording in the workplace that were not present in Whole Foods' rules.

The Board decision was not unanimous, and Member Miscamarra dissented, stating that the rules in question would be reasonably interpreted to encourage Section 7 activity, not discourage it. Additionally, a petition for review was filed on January 5, 2016. We will keep you updated on any developments regarding the *Whole Foods* decision.

Plainly the NLRB's decision is problematic for employers who seek to prohibit their employees from recording in the workplace. In view of this decision, our clients would be well-advised to review their existing recording policies to ensure they comply with the Board's interpretation of such policies. If you have any questions or wish to discuss any recording policies in light of this decision, please call the attorney with whom you usually work.

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