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NLRB "DELETES" EMPLOYER'S "NO-RECORDINGS" RULES

Many employers have rules prohibiting the recording of conversations or the taking of photos or videos in the workplace. Even if there is no rule, many employers will tell an employee who wants to record something that it's not allowed. Presumably, there may be several legitimate reasons for the employer's reaction to workplace recordings. It could be an invasion of privacy, embarrassing or harassment, or it could interfere with open communications. Of course, the employer might be trying to hide something, in which case, that's not necessarily a good reason.

Since at least 2001, the well-known international company, Whole Foods Market, had two company-wide "No-Recordings" rules. Many employers have similar rules. Those rules were the focus of an NLRB complaint alleging that the rules were unlawfully overbroad and interfered with employee rights to engage in concerted activity protected by the National Labor Relations Act. When the NLRB's administrative law judge first heard the case in 2013, he ruled that the rules were okay and recommended dismissal of the complaint. However, on December 24, 2015, two members of the NLRB (with one strong dissent) found the rules to be unlawful and ordered the rules to be rescinded with notices to employees that the rules have been deleted and that the company won't interfere with employee rights like that in the future.

THE EMPLOYER'S NO-RECORDINGS RULES

In order to understand the NLRB's decision, it makes sense to look at the rules that were held to be so unlawfully overbroad.

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> *In order to encourage open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust, Whole Foods Market has adopted the following policy concerning the audio and/or video recording of company meetings:*
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> *It is a violation of Whole Foods Market 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.*
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> *Please note that while many Whole Foods Market locations may have security or surveillance cameras operating in areas where company meetings or conversations are taking place, their purposes are to protect our customers and Team Members and to discourage theft and robbery.*
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> *It is a violation of Whole Foods Market 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.*

IT'S CHILLING! WHY THESE RULES WERE BAD

In essence, the rules at issue prohibit the recording of conversations, phone calls, images or company meetings with a camera or recording device without prior approval by management. The two NLRB members, contrary to the administrative law judge and their dissenting colleague, held that those rules would reasonably be construed by employees to prohibit legally protected concerted activity.

It is well settled that a rule violates the NLRA if it would reasonably tend to *chill* employees in the exercise of their legally protected rights. If the rule *explicitly* restricts protected activities, it is unlawful. If it does not, there is no violation unless: (1) employees would *reasonably construe* the language to prohibit protected activity; (2) the rule was promulgated in *response to union activity*; or (3) the rule has been

applied to restrict the exercise of protected rights.

Under the NLRA, employees in the private sector have the right to form or join unions, to engage in concerted activity for their mutual aid and protection or to refrain from any such activities. These are often referred to as "Section 7 Rights."

Such protected conduct may include, for example, recording images of protected picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions.

GOOD INTENTIONS WERE OVERCOME BY EMPLOYER'S ADMISSIONS

The rules contain language setting forth the legitimate intention to promote open communication and dialogue. But that was not good enough to overcome the broad sweep of the rule that failed to indicate where recordings might be okay. Indeed, the NLRB had an easy time reaching that conclusion when the main company witness testified that the rules apply "*regardless of the activity that the employee is engaged in, whether protected concerted activity or not.*" Thus, the company effectively admitted that the rules cover *all recordings*. Accordingly, in light of the broad and unqualified language of the rules and the company's admission as to their scope, the NLRB found that employees would reasonably read the rules as prohibiting recording activity that would be protected by Section 7.

BUT PROHIBITING RECORDING IS OKAY IN SOME SITUATIONS

The dissenting opinion by NLRB Member Miscimarra makes the point that the law allows an employer to prohibit recordings in order to encourage free expression among employees. He argues that not only are these no-recording rules aimed at fostering collective activity and free expression, the same rationale has been fully embraced by the NLRB in a line of cases making it *unlawful* for any party to insist to impasse on a recording or verbatim transcription of collective bargaining negotiations or grievance meetings because recordings may have a tendency to inhibit free and open discussions. He also points out that in health care settings, the recording of patients or recording in patient care areas can legally be prohibited.

LESSONS FOR PRIVATE EMPLOYERS

Even if there is no union involved, the NLRA applies to private employers and their employees. This federal law does not cover governmental employers and their employees. Further, the law does not protect supervisors and management employees in the private sector. In order to avoid problems later, private employers should review existing no-recording rules to make sure the language does not tend to chill employee exercise of protected rights to engage in concerted activity.

Reference: Whole Foods Market, Inc. (NLRB, December 24, 2015).

If you have any questions, please contact Steve Lyman at slyman@hallrender.com or your regular Hall Render attorney.