

The NLRB Finds Whole Foods' No-Recording Policy Unlawful

In *Whole Foods Market, Inc.*, the National Labor Relations Board, in a 2-1 decision, held that Whole Foods' rules prohibiting the recording of conversations in the workplace violated Section 8(a)(1) of the National Labor Relations Act. The two rules that were found to be unlawful were nearly identical. Both appeared in the company's General Information Guide, a guide that applied to all employees.

The first rule prohibited the recording of company meetings without prior approval from store management, and the second rule prohibited all recording in the workplace without similar prior approval. The stated purpose of both rules (as set forth in the Guide) was to encourage open conversation and dialogue, and to eliminate the chilling effect that may exist when someone is concerned a conversation is being secretly recorded.

Contrary to the stated purpose of the rules (to encourage open and honest communication), the Board majority instead found that such rules would reasonably be interpreted by employees to prohibit them from engaging in protected Section 7 activity. The Board majority reasoned that such rules would unlawfully prohibit employees from engaging in Section 7 activity such as (1) recording images of protected picketing, (2) documenting hazardous working conditions, or (3) documenting and publicizing various issues relating to terms and conditions of employment. The Board majority rejected the employer's (and the dissent's) contention that the stated intent of the rules (to encourage open and honest communications in the workplace without fear of surreptitious recordings) constituted a valid overriding employer interest to justify the rules.

So, it is clear that the current Board will likely find no-recording rules in the workplace to be a violation of the NLRA unless the employer can establish a valid overriding interest to justify such rules. Considering the current pro-union makeup of the Board, establishing such an overriding interest will likely be difficult, and such rules will be aggressively scrutinized. Nonetheless, certain narrowly tailored restrictions supported by valid business justifications may be upheld by the Board. For example, a rule prohibiting the recording of meetings in which confidential information or trade secrets are discussed, or a rule prohibiting the recording of conversations involving private client or patient information, may be found to be lawful. However, at this point, employers should be wary of imposing broad no-recording rules in the workplace.

Employers may require employees to follow applicable state or federal laws regarding secret recordings. The impact of an employer's ability to impose this restriction is limited in New York, where an individual may lawfully record a conversation as long as the individual doing the recording is a party to the conversation. However, an employer's ability to impose this restriction would have a significant impact in states such as Massachusetts and California, where the law requires that all parties to a conversation must consent to the recording of the conversation.

The Board's decision in the *Whole Foods* case may not necessarily be the last word on this issue, because the company has appealed the decision to the Second Circuit Court of Appeals, which may be more sympathetic to the valid business justification for the company's no-recording rules. However, it may be worthwhile for employers to consider whether they currently have policies in their employee handbooks that prohibit recordings in the workplace, and if so, whether those policies should be revised. Employers should consult with legal counsel to assess the potential valid business justifications for the policies and to review any recording laws that may be applicable to employees in particular locations. Both the valid business justifications and any legal restrictions on recordings in the workplace should be expressly stated in the policies.

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