

## **NLRB Holds That a Ban on Videotaping Workplace Conversations is Unlawful**

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Recently, the National Labor Relations Board (NLRB) held that an employer violated Section 7 of the National Labor Relations Act (NLRA) by maintaining a policy that prohibited employees from making certain audio or video recordings in the workplace. At issue in *Whole Foods Market, Inc.* was the legality of the retailer's nationwide policy which prohibited recording "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.)" without prior approval from management. Whole Foods' policy further stated, "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." The ban on recording conversations applied only to employees on working time and did not prevent employees from engaging in recording activity while on break or other non-working time.

The Board held, however, that Whole Foods' policy was unlawful because it could have a chilling effect on employees' protected, concerted activity under Section 7 of the NLRA. In reaching this conclusion, the Board acknowledged that there was no evidence in the case that Whole Foods intended to curtail protected activity or had any anti-union animus in enacting its policy, nor was there any evidence that the policy had actually deterred the exercise of protected activity. Nevertheless, the Board concluded that the policy had the potential to discourage employees from exercising their protected rights because recordings could be used – and had been used in other unrelated cases with other employers – for employees' mutual aid and protection. In defending the rationale behind this policy, Whole Foods explained that it sought to encourage candor and protect privacy in workplace meetings and conversations, such as annual town hall meetings and termination-appeal peer panels. In rejecting Whole Foods' arguments, the Board held that the retailer's business justifications were "not without merit" but were "based on relatively narrow circumstances." The Board also held without explanation that the differentiation between working time and non-working time was irrelevant.

The Board's decision seems ignorant of the realities of the modern workplace, as it fails to acknowledge the disruption that can be caused by employee use of cell phones and other recording devices during work time. In a footnote, the Board acknowledged that employers could maintain written policies preventing certain recordings in the workplace provided that such policies were "narrowly drawn, so that employees will reasonably understand that Section 7 activity is not being restricted." However, the Board provided no roadmap as to what these lawful policies would look like. Further, the Board's decision does not address the fact that many states, including Massachusetts, require two-party consent to an audio or video recording to comply with the state wiretapping law. In the wake of this decision, employers should review their policies regarding employees' use of cameras (including camera phones) or other recording devices in the workplace to ensure that the policies are sufficiently narrow and do not deter activity protected by Section 7.

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