BARNES & THORNBURG LLP

Just A Reminder: Your Employees May Be Recording You

February 13, 2020 | Labor And Employment,National Labor Relations Board

Mark Keenan
Partner

Over the past decade, more and more employees have begun recording workplace meetings and conversations – particularly as the evolution of smartphones makes surreptitious recordings easier to accomplish. During union campaigns, such recordings are usually intended either to embarrass the employer via social media or to support a union's claims of unlawful managerial action during so-called captive audience meetings. Employees also frequently make recordings to support claims of discrimination and harassment.

During the Obama administration, the NLRB substantially broadened employees' rights to surreptitiously record managers and supervisors. It found that such activity could constitute protected activity under federal labor law, and that employer policies intended to limit recordings by employees were unlawful. Decisions supporting this activity included *Whole Foods, 363 NLRB No. 87 (2015)*, and its 2017 appeal *Whole Foods Mkt Group v. NLRB*, which found workplace policy broadly prohibited employee recordings to be unlawful. Whole Foods requested that the Trump NLRB reconsider that ruling in 2017, and the NLRB declined to do so.

A recent decision of the NLRB serves as a reminder that the NLRB continues to view employee recordings as protected activity. In *ADT, LLC, 369 NLRB No. 23 (2020)*, the NLRB unanimously upheld an administrative law judge's decision that found that ADT's discharge of two employees who recorded two

RELATED PRACTICE AREAS

Labor and Employment
Labor Relations
National Labor Relations Board (NLRB)

RELATED TOPICS

Recording Devices
Protected Activity

captive audience meetings was unlawful.

ADT conducted the meetings during a decertification drive and during the meetings encouraged employees to vote out the union. Two employees recorded the meetings and later turned over the recordings to IBEW representatives on a flash drive. ADT became aware of the recordings, conducted an investigation, confirmed the employees had recorded the meetings, and then terminated the employees for violating a company policy that prohibited recordings if such recordings violated any state law. ADT apparently believed that Washington state law required consent of all parties before a conversation could be recorded, but importantly, that state law only applied to telephone conversations – not in-person conversations where there was no expectation of privacy. The NLRB's administrative law judge concluded the recordings were lawful under state law, the employees were engaged in protected activity, and that their subsequent discharges were unlawful.

Although the Trump NLRB has reversed a number of Obama era decisions, it has not yet addressed the question of whether an employer may broadly prohibit employee recordings. However, its decision in *The Boeing Company, 365 NLRB No. 154 (2017)*, which developed a new standard for evaluating employer handbook rules, may provide a basis for adopting such restrictions.

Currently, the NLRB will find such recordings protected if: employees are acting in concert for their mutual aid and protection – in other words, engaged in "concerted" activity – and the employer does not have an overriding interest in restricting the recording.

The types of recordings that might be protected include documenting:

- Unsafe or hazardous working conditions
- Discussions about employment terms and conditions (even if led by management)
- Perceived inconsistencies by the employer applying workplace rules

It should be noted that in *The Boeing Company*, Boeing successfully defended its "no camera" rule, including camera enabled devices such as smartphones, in part by arguing that the policy was part of its security protocols to work as a federal contractor and to protect its proprietary information. Other employers could face challenges demonstrating the need for a broad-based no recording or no camera policy.