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‘Smile, You’re On Candid Camera’ – Federal Court Upholds NLRB Ruling That Prohibits Non-Union Employers From Banning Recordings In The Workplace

June 5, 2017 | | National Labor Relations Board,Labor And Employment

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Many employers maintain policies prohibiting surreptitious recordings in the workplace. As noted on the blog last year, however, the National Labor Relations Board (NLRB) struck down such a policy in *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015). In that case, the NLRB held that an employer’s prohibition on the use of recording devices in the workplace to record conversations, events, etc., without company authorization was unlawful under the National Labor Relations Act (NLRA). Citing Section 7 of the NLRA – which protects employees engaging in “concerted activity” for “mutual aid and protection” – the NLRB reasoned the policy was unlawful because there are some circumstances under which employees may be permitted to record activities or conversations in the workplace that relates to their terms and conditions of employment (e.g., picketing activity, unsafe work conditions employees have concerns over, inconsistent application of workplace rules, etc.) Whole Foods appealed that decision to the U.S. Court of Appeals for the Second Circuit. Unfortunately for employers, the Second Circuit upheld the NLRB’s decision on June 1. The court agreed with the NLRB’s rationale that a blanket ban on workplace recordings generally violates Section 7 of the NLRA. Accordingly, any companies that have these types of rules in effect need to consider revisiting these policies as soon as possible. When employers are evaluating whether to implement and/or maintain a policy limiting workplace recordings, the wording used and stated purpose will be critical. For example, the NLRB noted that it previously allowed a hospital to ban recordings where patient privacy was cited as the basis for the policy. Therefore, if employers are able to articulate (and establish) a similar privacy interest as the basis, that may give them some flexibility; general assertions of “confidentiality” and “encouragement of honest dialogue” will not carry the day, however, based on the NLRB’s (and now Second Circuit’s) Whole Foods decision. Importantly, the decision applies to union **and** non-union employers alike.

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