

NLRB Finds Whole Foods' Prohibition against Workplace Audio Recordings Unlawful

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The National Labor Relations Board (the Board or NLRB) recently held in *Whole Foods Market Group, Inc.* that unqualified prohibition of all workplace audio recording was unlawfully overbroad under the National Labor Relations Act (the Act) because photography or audio and video recording in the workplace are protected activity under “certain circumstances.” The NLRB provides minimal guidance regarding what circumstances qualify as “certain circumstances.”

The Board found the following Whole Foods workplace rules did not differentiate adequately between protected and unprotected recordings under the Act, thus potentially leading employees to read the rules reasonably as prohibiting recording activity that would be protected:

Team Meetings: 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:

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.

Team Member Recording: 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 identical matters are being discussed.

The Board held employee recording in the workplace is protected if: 1) employees are acting in concert for their mutual aid and protection; and 2) no overriding employer interest is present. A recording can be concerted or for mutual aid and protection even if engaged in by one individual, so long as it is undertaken, for instance, to initiate or induce group action. Examples provided by the

Board include: 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 a trial or hearing.

In prior case law, the Board found in a hospital setting that patient privacy interest and HIPAA obligations qualify as an overriding employer interest, justifying the prohibition of certain recording in the workplace. In the *Whole Foods* case, however, the employer's asserted interest in prohibiting recording—open communication and employee privacy—did not qualify as an “overriding employer interest” in the eyes of the Board.

Following the *Whole Foods* decision, employers may still maintain rules regulating recording in the workplace, but the rules must be narrowly drawn to prohibit recording under only limited circumstances and must be connected to an overriding employer interest. How narrow is narrow enough and what qualifies as an overriding employer interest will depend, in any particular case, on the specific industry, workplace setting and facts involved in that case.

In light of the Board's *Whole Foods* decision, employers can expect the NLRB to scrutinize policies prohibiting recording more closely. Employers, therefore, should consider reevaluating their policies on still and video photography and audio recording in the workplace.

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