



Can Your Employees Take A Selfie At Work?

Insights

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Many employers maintain policies prohibiting employees from using cell phones and other recording devices at work. The reasons for such policies range from maintaining productivity, to protecting customer and employee privacy, to eliminating the way that recording devices limit the free and candid flow of workplace exchanges.

While these concerns are certainly understandable, you should consider the implications that a recent decision by the National Labor Relations Board (NLRB) might have on your policies. Most recently, the agency invalidated an employer's policies restricting workplace recording, causing a shift in the legal landscape.

But Taking Workplace Pictures Isn't Protected . . . Is It?

In the Board decision of *Whole Foods Market Group, Inc.*, the NLRB held that "photography and audio or video recording in the workplace, as well as the posting of photographs and recordings on social media," are protected by the National Labor Relations Act so long as employees are acting "in concert for their mutual aid and protection and no overriding employer interest is present."

This means that the Board will now find a violation if your business maintains a blanket prohibition on workplace recording unless you can show you have a legitimate business reason. It's important to note that this rule applies to all workplaces, and not just ones with a unionized workforce.

The Board went on to specify a number of employee recording activities deemed to be protected, including:

- 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; and
- recording evidence to preserve it for later use in administrative or judicial forums.

Consequently, the mere act of maintaining a policy (regardless of whether it is actually enforced) that prohibits workplace recording now constitutes a violation of the Act. Moreover, even absent such a policy, disciplining or discharging an employee for using a recording device as illustrated by any of the above examples would be considered a violation of the Act.

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What Can I Do To Protect My Business Interests?

As noted above, the Board does recognize that important employer interests may, in limited circumstances, override the general principle that protects the right to engage in workplace recording activities. In all likelihood, however, these exceptions will be narrowly construed.

Indeed, many genuine employer interests are likely to fall short of Board standards. In *Whole Foods*, for example, the Board found that the articulated rationale behind the policy at issue (encouraging the free flow of ideas by limiting the chilling effect of workplace recording) failed to overcome an employee's right to use such a device at work.

Protecting trade secret and other highly confidential business information may ultimately prove sufficient to overcome the Board's rule against recording policies, but such an argument has not yet been tested. Like other employer policies that have been challenged by the Board over the past several years, this is a rapidly developing area that you should monitor carefully.

Do I Need To Revise My Handbook?

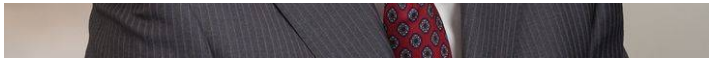
If you have a policy prohibiting your employees from recording in the workplace, you should consider having that policy reviewed in the near future to determine whether a revision is necessary. In addition to unions, employees and plaintiffs' attorneys are increasingly targeting nonunion employers with unfair labor practice charges challenging an array of policies and procedures. Recent examples include arbitration agreements prohibiting class action waivers, confidentiality policies, off-duty access restrictions, and social media policies.

You should regularly review your handbook to ensure you are keeping up with the quickly evolving rules adopted by the Board. Like the "no-recording" rule found unlawful in *Whole Foods*, you may be surprised by the seemingly common-sense policies that no longer pass muster.

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