

Another One Bites The Dust: NLRB Invalidates Another Widely-Used Personnel Policy

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Over the last few years, employers have seen the National Labor Relations Board (NLRB) strike down social media policies, email policies, workplace disruption policies and various other "work rules" that are common in workplaces across the country. On Dec. 24, the NLRB struck down yet another one. In *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015), the Board 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). Two Whole Foods policies at issue:

1. **Team Member Recordings:** 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 to 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. Violation of this policy will result in corrective action up to and including discharge.
2. 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.

Please note that while many Whole Foods Market locations may have security or surveillance cameras operating in areas where company meetings or conversations are taking place, their purposes are to protect our customers and Team Members and to discourage theft and robbery.

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Citing Section 7 of the NLRA - a section that protects employees engaging in "concerted activity" for "mutual aid and protection" - the NLRB reasoned that both policies were 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.). According to the Board, both policies would have led employees to believe they were not allowed to record activity protected by Section 7 of the NLRA. Thus, the Board held that employer policies prohibiting workplace recordings generally will be found to be unlawful under the NLRA if those policies can be viewed as restricting employees' rights to record activities protected by Section 7. This case is the latest example of the Board expanding its interpretation of Section 7 to invalidate employer workplace rules. While the Board indicated it may find other recordings policies to be lawful, it failed to offer any definitive guidance on what language in such a policy it would accept. Accordingly, any companies that have these types of rules in effect need to revisit these policies in the new year. When employers are evaluating whether to implement and/or maintain this type of rule, 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 rule. Accordingly, 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 Whole Foods decision.