

## Are You Recording This Conversation?

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Most of us expect to engage our colleagues without concern that our workplace conversations are secretly recorded. However, today everyone has a smartphone that readily allows for spontaneous photographic, video, and audio recording. Until recent times, attorneys generally advised clients that it was appropriate to insist that workplace conversation not be recorded. Employers took the position that a team culture did not support recording conversations; colleagues need to be able to speak freely with each other at work. That argument just lost-out in the U.S. Court of Appeals for the Second Circuit (Connecticut, New York, and Vermont). On June 1, the court upheld a 2015 National Labor Relations Board (NLRB) ruling that rejected a Whole Foods Market Inc. policy that required management approval before making workplace recordings. The NLRB had ruled the policy was overly broad and the Second Circuit agreed, mainly because the policy is “not limited to controlling those activities in which employees are not acting in concert.” In his 2015 losing dissent, current NLRB Chairman Philip Miscimarra stated that employees reasonably understand the rule’s intent was to “promote open, free, spontaneous dialogue” and not to interfere with protected activity. The Second Circuit left open the possibility that an employer could craft a policy limiting photographic, video, and audio recording where no protected concerted activity is implicated or an overriding employer interest is present. Protected recording could include images of employee picketing, documenting unsafe workplace hazards, documenting and publicizing discussions about terms and conditions of employment, or documenting inconsistent application of workplace rules. An overriding employer interest could also extend to matters such as patient privacy and trade secrets. Crafting a defensible policy under this NLRB and Second Circuit precedent without presenting a road map to employees remains a challenge; employers may choose to not have a policy and merely address recording issues as they develop under existing workplace rules.

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