

NLRB Decision Strikes Down Whole Foods Market's Recording Restriction in the Workplace

Does your company have policies prohibiting audio or video recording or photography in the workplace? If so, your company may need to rethink those policies in light of the recent National Labor Relations Board ("NLRB") decision in *Whole Foods Market Inc.*, which call such policies into question.

Whole Foods had two policies prohibiting recordings in the workplace without prior management approval: (1) "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." (2) "It is a violation of [company] 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 grocery chain's legitimate business justification for the recording restrictions was "to encourage open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust."

A divided NLRB found that the Whole Foods policies unlawfully infringed upon employee's Section 7 NLRA rights. Section 7 gives employees "the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The NLRB held that Whole Foods' policies prohibiting recording in the workplace were not narrowly tailored such that employees "understand that Section 7 activity is not being restricted."

The Board stated Section 7 protects photography and audio or video recording in the workplace, as well as the posting of photographs or recordings on social media, as long as "employees are acting in concert for their mutual aid and protection and no overriding employer interest is present." The Board's examples of protected activity included 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 for later in administrative or judicial forums in employment-related actions.

Whole Foods is another example in a long series of NLRB decisions which broaden the interpretation of employees' Section 7 rights. Employers should review their existing policies and be cautious when disciplining an employee for taking photographs or recording videos in the workplace. If a company continues to maintain no-recording policies, it should make sure to explicitly define their business justifications for such policies and narrowly tailor those policies to prohibit the recording only of information that is not protected by Section 7.

Whole Foods is currently on appeal to the Second Circuit of the U.S. Court of Appeals.

Please contact an attorney at Madigan, Dahl & Harlan to ensure that your company's policies regarding recordings in the workplace do not violate current laws.