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BLOGS

Archives; Labor & Unions; Privacy & Information Security; Workplace Policies

The Gray Zone – Recording Devices in the Workplace

The National Labor Relations Board (NLRB) has once again entered the confusing and inconsistent intersection between our technological ability to record almost anything and the rights of employers to restrict recordings in the workplace (the Gray Zone). (See our [prior discussion](#) about this topic in 2013). In a [recent decision](#), the NLRB struck down a Whole Foods workplace policy banning employees from recording conversations or taking photographs in the workplace without approval.

In the decision, the NLRB concluded that the Whole Foods policy would reasonably be construed by employees to prohibit their Section 7 labor law right to engage in protected concerted activity to better their working conditions. Despite an effort by Whole Foods to show that the policy was intended to encourage open and frank conversations by eliminating the chilling effect resulting from an employee knowing he or she is being recorded, the NLRB reasoned that workplace photography or recording, covert or otherwise, is an essential piece of employees ability to vindicate their Section 7 rights.

Given the NLRBs position, employers should engage in a careful analysis before implementing, revising or eliminating policies relating to recording in the workplace. The NLRB decision is very fact specific, and the NLRB did not make any finding that any particular type of recording was protected concerted activity. Rather, the decision indicated that the policy at issue was too broad. In addition, the decision ignores many industry-specific considerations that should drive an employers policy decisions, such as confidentiality requirements under HIPPA for the healthcare industry and FERPA in the education arena. Finally, many states have specific statutory wiretapping laws prohibiting recordings unless all parties consent. As a result, the NLRB decision has done little to change the murky nature of the Gray Zone.

Going forward, it is important to keep in mind that it may be some time before we have clarity on this issue. Technology has always been ahead of our laws and court decisions. On this issue, the NLRBs position has not been tested by any court. We will definitely see more on this topic in the future.