

Second Circuit Upholds NLRB Ruling That Employer's "No Recording" Policy Violated National Labor Relations Act

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Employers need to be mindful about policies prohibiting employees from recording or videotaping in the workplace, as such rules, if not drafted carefully, may run afoul of the National Labor Relations Act (the Act). This point is illustrated by the U.S. Court of Appeals for the Second Circuit's recent (unpublished) decision in *Whole Foods Market, Inc. v. N.L.R.B.*, which upheld a ruling by the National Labor Relations Board (NLRB) that an employer's blanket policy prohibiting recordings in the workplace violated its employees' rights to engage in protected concerted activities under the Act.

Admittedly broad in scope, the at-issue policy sought to prevent on-the-job recording of any kind, including videos, without prior approval. The stated justification for the policy was to foster "spontaneous and honest dialogue" among the employees. However, in overruling the administrative law judge who initially decided the case, the NLRB held that the policy had the impermissible effect of chilling employees' exercise of rights to discuss terms and conditions of employment, including to enable vindication of any violations of the same by their employer.

In upholding the NLRB, key to the Second Circuit's decision was its observation that – as written – the policy prohibiting without prior management approval all recording on threat of discipline could reasonably be construed as preventing actions protected by the National Labor Relations Act.

It remains to be seen whether the NLRB's underlying 2015 ruling will be revisited as the Trump administration fills NLRB posts. For now, a prudent employer will try to avoid becoming the next test case by carefully drafting any no-recording policy, such as by narrowly and specifically exempting matters protected by the Act from the recording prohibition. Employers who want to preserve valid restrictions on their employees' workplace conduct should feel free to contact anyone in our [Labor and Employment Group](#) for guidance on how to draft and enforce such policies.