

CLIENT ALERT

NATIONAL LABOR RELATIONS BOARD RULES THAT EMPLOYER POLICIES PROHIBITING ALL VIDEO AND AUDIO RECORDING, WITHOUT EXPRESS EXCEPTIONS FOR PROTECTED ACTIVITY, ARE UNFAIR LABOR PRACTICES

The National Labor Relations Board (“NLRB”) has ruled, in a 2-1 vote, that employer policies that prohibit employees from making any video or audio recordings in the workplace violate the National Labor Relations Act, unless the policies expressly state that employees may make recordings for purposes of concerted action for their mutual aid and protection. Whole Foods Market, Inc. and United Food and Commercial Workers, 363 NLRB No. 8 (2015).

In the case, brought against Whole Foods supermarkets, the NLRB held that Whole Foods’ blanket rules forbidding any workplace recording had an unlawful “chilling effect” on employees’ willingness to make recordings for the purpose of acting in concert for their mutual aid and protection (such as recordings made of protected picketing or unsafe work conditions). As a result of this decision, some doubt has been cast upon whether employers can impose a blanket prohibition on any and all recording or videotaping of activities in the workplace that does not expressly provide an exception for recordings employees make to protect their rights engage in concerted action under the National Labor Relations Act.

The NLRB’s decision is controversial and even one of the NLRB members on the panel that decided the case disagreed with the decision. Accordingly, it is unclear at this time which view will ultimately prevail when courts review the NLRB’s decision.

Until the courts rule and provide clarity on this issue, we suggest that, before disciplining an employee for prohibited recording, employers carefully consider whether the need to discipline the employee is worth the risk the NLRB will find the discipline to be an unfair labor practice.

If you have questions or would like additional information, please contact Amanda M. Fugazy (afugazy@egsllp.com), Paul P. Rooney (prooney@egsllp.com), Valerie J. Bluth (vbluth@egsllp.com) or the primary EGS attorney with whom you work.

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