# Are We Being Taped? – The Second Circuit Weighs in on Workplace Taping

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In the era of the ever-present cell phone, where many people seem to video and record (and then post to social media) virtually everything that goes on in their lives, employers have tried to limit such activity in the workplace with blanket "no recording" policies. These were just dealt a blow last week, when the Second Circuit affirmed a decision by the NLRB, which held that very broad no-recording policies do violate Section 8(a)(1) of the National Labor Relations Act ("the Act"). See Whole Foods Market Group Inc. v. NLRB, 16-0002 (2d Cir. June 1, 2017).

- **Are all such policies now unlawful?** NO.
- **What should employers do?** Read on. Employers now need to go back and review their policies and, if it can be justified, create a tailored policy designed to protect information that deserves protection, but is not so broad that it can be seen as curbing employee's rights to organize and bargain collectively.

**Background**

The employer in the case, national retailer Whole Foods, had a policy that prohibited any sort of recordings of staff meetings or other workplace conversations, without prior supervisor approval or the consent of all involved. In its staff manual, Whole Foods stated that the purpose in having this prohibition is "to eliminate a chilling effect on the expression of views" when people fear that they may be secretly recorded. This rationale was rejected.

The NLRB had found that Whole Foods' policy violated the National Labor Relations Act, because it could be "reasonably construed" to discourage employees from exercising their rights under the Act to engage in "concerted activities," in order to further their interest in "mutual aid or protection," known as the *Lutheran Heritage* test. Under this test, a policy is unlawful if employees can "reasonably construe" the policy as discouraging them from exercising the rights protected by the NLRA. The Board has found in prior cases that policies prohibiting employee recording and photographing of picketing, unsafe working conditions, or other perceived unequal treatment were unlawful.

Notably, the Second Circuit observed in the decision that the defendant did not try to challenge the *Lutheran* test.

The Board and the Second Circuit held that the fatal flaw in Whole Foods' policy was its breadth – that it banned ALL employee recordings, of any type, absent supervisor approval.

Neither the NLRB nor the Second Circuit was persuaded by Whole Foods' argument that the policy

helps to foster the open dialogue between staff members that it considers a cornerstone of its company culture. The Second Circuit found that, in the absence of any evidence of "weighty" countervailing interests in protecting the confidentiality of information, like protecting patients' privacy rights. Whole Foods' no-recording policy was overbroad and unlawful.

**Employer Takeaways**

- **All "no recording polices" are now NOT unlawful**

This case is not an outright ban on any employer policy that limits workplace recording. The NLRB has recognized that there may be other laws and considerations which require an employer from limiting certain types of workplace recording. This case's resolution relied heavily on the fact that Whole Foods did not take sufficient care in providing exceptions to the recording ban for activities that the Act protects.

Between the extremes of widely permitted and strictly banned recording, however, is an as-yet undefined grey zone. The following considerations may offer some clarity as to what is legally permissible.

- **Prepare a "no recording policy" which is limited in scope**

An employer cannot issue an outright ban that prohibits all its employees' ability to record. Also, given the Second Circuit's language, citing such things as preserving corporate culture and promoting free speech among staff members appears to be insufficient; to withstand scrutiny, any such restrictions must be to protect a "pervasive or compelling" interest like individuals' privacy rights.

- **Draft policies which meet your business needs**

Look at the laws that regulate your business. For example, if you are a hospital or health care provider, HIPAA prohibits the disclosure of any patient information. You can and should have a policy that prohibits recording or disclosure of patient information.

If you are in financial services, you can likely have a policy that prohibits disclosure of confidential financial information.

If you handle consumer or customer information, you can have a policy that prohibits any recoding of their private information.

- **Think about your employee audience**

Both the NLRB and the Second Circuit reaffirmed that under the *Lutheran Heritage* test, employers must consider how employees may "reasonably construe" the language and scope of the policies in question. Thus, when drafting a policy, make it as clear and straightforward as possible. Tell employees in plain language that it does not prohibit all recording, but just prohibits recording of certain materials or content.

- **Train managers to know what is covered (and what is not)**

Clear policies can help provide guidance for people who implement them, but drafting clear policies alone is not enough. Managers and other supervisor-level staff still need to know what kinds of situations fall within the policies and what those look like in actuality. Having this common understanding can help to reduce instances of when protected conduct is inappropriately sanctioned.

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