
FIFTH CIRCUIT REJECTS “NO-RECORDING” POLICIES IN THE WORKPLACE

A workplace policy or rule broadly prohibiting audio and video recordings by employees in the workplace without management approval violates the National Labor Relations Act (NLRA), according to a recent decision by the Fifth U.S. Circuit Court of Appeals in *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265 (5th Cir., July 25, 2017).

The NLRA guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and thus a work rule that employees would reasonably understand as prohibiting the exercise of their rights under the NLRA is unlawful.

T-Mobile maintained a personnel policy prohibiting recording (including audio and video) in the workplace without prior management approval. T-Mobile maintained that the ban’s stated purposes— “[t]o prevent harassment, maintain individual privacy, encourage open communication, and protect confidential information”—would advance legitimate business interests in a civil and secure workplace. Nevertheless, the general counsel of the National Labor Relations Board (NLRB) argued that the recording ban was unlawful because employees could reasonably construe the language to prohibit protected concerted activity.

The Fifth Circuit agreed, holding that the rule’s plain terms were “stated so broadly that a reasonable employee, generally aware of employee rights, would interpret it to discourage protected concerted activity, such as even an off-duty employee photographing a wage schedule posted on a corporate bulletin board.” Citing a similar decision recently handed down by the Second Circuit in *Whole Foods Market Group Inc. v. NLRB*, Nos. 16-0002-ag, 16-0346, 2017 WL 2374843 (2d Cir., June 1, 2017), the court declined to discuss how far a recording ban may permissibly reach, stating in a footnote that “[w]e need not decide whether and to what extent such a right exists; we are satisfied that, as in the example provided above, there are circumstances in which taking photographs or recordings may be protected activity, and that T-Mobile has not provided any legitimate reason why its ban ought to be allowed to encompass such activity.” For this reason, the Fifth Circuit affirmed the NLRB’s order directing T-Mobile to rescind its “no-recording” policy.

This is not to say that every “no-recording” policy will necessarily infringe on employees’ legally-protected rights. In a footnote, the Second Circuit’s *Whole Foods Market Group Inc. v. NLRB* opinion specified that Whole Foods’ interests in maintaining “no-recording” policies could “be accommodated simply by their narrowing the policies’ scope.” Accordingly, while it is possible to draft a “no-recording” policy that could pass muster under NLRB scrutiny, employers must be careful to limit such restrictions to only such activities in which employees are acting solely by and on behalf of

themselves. In any event, employers should consult with counsel before disciplining an employee for recording a workplace conversation, interaction, or condition.

On a side note, the NLRB originally found that 15 separate personnel rules at T-Mobile violated employees' rights under the NLRA. T-Mobile acquiesced to 11 of these, and elected to appeal just four provisions in its handbook that "(1) encouraged employees to 'maintain a positive work environment'; (2) prohibited '[a]rguing or fighting,' 'failing to treat others with respect,' and 'failing to demonstrate appropriate teamwork'; (3) prohibited all photography and audio or video recording in the workplace; and (4) prohibited access to electronic information by non-approved individuals." While the Fifth Circuit ruled in favor of T-Mobile on all but the recording ban, employers should remain aware that the NLRB continues to actively scrutinize many workplace policies it deems to interfere with "concerted activities" protected by NLRA.

Questions? If you have any questions about how to properly draft a "no-recording" policy for your workplace, or whether your workplace policies could generally avoid NLRB scrutiny, we have the experience and expertise to help. Please contact the Thompson & Knight attorney with whom you regularly work or one of the attorneys listed below.

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