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Meet Nancy Gray



In a diverse legal career that has spanned over three decades, attorney Nancy Gray has represented hundreds of clients in a variety of civil matters, including labor and employment (management/employee); sexual harassment, discrimination, wrongful termination; commercial,

When Are Workplace Recording Restrictions Unlawful?

What, if anything, may an employee legally record in the workplace? This question is more important than ever given today's technology, the fact that rights of privacy are very limited in the workplace, and that the employer has broad discretion to regulate the conduct and activity of employees. A fundamental precept of labor law is that "working time is for work." Since audio and video recording, as well as photography, distract employees from accomplishing their work tasks, many employers promulgate policies which prohibit these activities.

However, any lawful use of electronic recording devices by employees in the workplace may now be permitted as protected concerted activity under § 7 of the National Labor Relations Act ("NLRA").

In a December 2015 case, and one of first impression, *Whole Foods Market, Inc.*, 363 NLRB No. 87 (Dec. 24, 2015), the National Labor Relations Board ("NLRB") decided that blanket or unqualified employer policies that prohibit employees from recording company meetings or conversations with other employees are unlawfully overbroad.

contract and business issues.

Among other highlights, Ms. Gray served as Assistant District Attorney in New York, spent seven years with a national law firm working on complex pharmaceutical and medical device cases, and successfully litigated and coordinated cases around the country. She has a unique expertise in matters pertaining to the adulteration of extra virgin olive oil.

Ms. Gray has also lectured and written on a variety of topics, including expert testimony, drug and medical device regulation, sexual harassment, employment practices and child performer issues.

In 1997, she started her own firm, based in Los Angeles.

Having been raised in New York City, Nancy enjoys dramatic, musical and comedy theater as well as pro sports. She is a PADI-certified scuba diver. Among her favorite reading material is Bon Appetit and anything pertaining to criminal behavior and behavioral profiling.

Accreditations



While stating that certain circumstances exist where such prohibitions may be permitted, the NLRB failed to provide meaningful guidance as to what those circumstances might be.

In limited situations, an employer's right to manage its business must yield to certain core § 7 activities. In this case, Whole Foods issued policies prohibiting recordings without prior approval of store leadership unless all parties to the conversation consent. A violation of those policies subjected an employee to possible termination. According to the decision by the NLRB, however, workplace photography and any audio-video recordings are protected by § 7 of the National Labor Relations Act as long as "employees are acting in concert for their mutual aid and protection and no overriding employer interest is present." The employer argued that its policy was to promote open communication and employee privacy, but the NLRB did not find that this interest qualified as an "overriding employer interest." However, the NLRB suggested that compliance with state law prohibiting nonconsensual recording would serve as a qualifying interest under the NLRA.

Moreover, because the employer's workplace recording policies did not clearly and adequately differentiate between protected and unprotected recordings under the NLRA, employees could reasonably interpret the rules as prohibiting recording-related activity protected by § 7. The NLRB provided examples of protected activity as including: recording images of protected picketing; documenting unsafe workplace equipment or hazardous working conditions; documenting and publicizing discussions about terms and conditions of employment; documenting inconsistent application of employer rules; or recording evidence to preserve for later use in a judicial or administrative trial or hearing.

The NLRB pointed out that some states, including California, have two-party

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consent laws that prohibit nonconsensual recording. Even in two-party consent states such as California, however, the anti-recording policy was unlawful because it was not limited to Whole Foods stores in the states where nonconsensual recording is illegal. The NLRB stated, "the Respondent's rules do not refer to those laws and do not specify that the recording restrictions are limited to recording that does not comply with State law."

The NLRB implicitly suggested that had the recording policy contained such a reference, the employer might have been able to establish an overriding interest, at least to the extent the rule applied in those states with similar laws on the books.

The NLRB also mentioned that some employer restrictions on recording may be valid depending on the employer's type of business. Prior to the Whole Foods case, the NLRB had only addressed an employer's anti-recording rule in a hospital setting. In *Flagstaff Medical Center Inc.*, 357 NLRB No. 65 (2011), the NLRB upheld the employer's policy against recording based on the privacy interests of the hospital's patients, noting that federal privacy law prohibits the unauthorized disclosure of a patient's health information. The anti-recording rule was a legitimate means of protecting patient confidentiality which was an overriding employer interest.

The Whole Foods decision is another example of the NLRB's continued expansion of the definition of "concerted activity" protected by the NLRA and specifically § 7. As we have seen in prior newsletters, some of these decisions are in response to modern technology and social media. It is important to note that the Whole Foods ruling does not give employees an unfettered right to record. An employer may still be able to maintain a no-recording policy in two-party consent states (where nonconsensual recording is illegal) or where a valid business justification exists.

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GrayFirm.com - 310.452.1211 - NGray@GrayFirm.com