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## Authors:



Gary S. Starr  
(860) 251-5501  
gstarr@goodwin.com



Jarad M. Lucan  
(860) 251-5785  
jlucan@goodwin.com

## NLRB Strikes Down Policy Prohibiting Recordings by Employees

The National Labor Relations Board (“Board”) finished the 2015 year in the same way it started: With continued scrutiny of seemingly neutral employer policies. The Board continues to assume that employees will read these policies and assume that their rights to engage in protected activities are being prohibited.

The latest policies under assault? Policies that prohibit unauthorized recordings in the workplace.

In a recent case, Whole Foods had adopted a policy to encourage open communications among management and employees by prohibiting the recording of conversations, phone calls, images, or company meetings with any recording device, including smart phones, without prior approval of management. The policy was designed to encourage the free exchange of ideas and concerns in situations such as regional employee meetings without local managers present, department meetings, and peer-reviewed disciplinary appeals.

The Board found that the policy was overly broad and infringed on employees’ rights under the National Labor Relations Act because employees could reasonably interpret the policy to restrict protected activities. The majority believed that the policy was worded to prohibit activities occurring during non-working time. The Board found that the policy barred employees from recording safety violations, from recording threats of a company shut down during a union organizing campaign, from recording threats that the company would refuse to negotiate with a union, or from recording threats to permanently replace strikers. In addition, the Board found that the policy could be interpreted to restrict employees from documenting the inconsistent application of work rules. In doing so, the Board assumed that the employee recording the actions was doing so for the benefit of other employees, and thus engaged in protected concerted activity.

The Board was careful not to say that any restrictions on recording would be unlawful, particularly because many states bar recordings of conversations unless the parties to the



conversation both consent, such as in phone conversations, or state laws may consider the secret recording to be an invasion of another employee's privacy. According to the Board, if there are state laws limiting recordings, the policy should reference those laws.

The Board also suggested that policies 1) must not prohibit "protected activities," 2) must not prohibit activities that occur during non-working time; or 3) must not prohibit activities that require advance employer permission. While the Board has allowed a no-recording policy in the past where patient privacy interests and other HIPAA covered obligations existed, the new ruling from the Board makes that the exception, rather than the rule.

So what is the moral of this story? Employers must review and revise their policies restricting recording or copying information related to their business, and be sure to include a disclaimer about not restricting employee rights. While the NLRB has no jurisdiction over public sector employees, the Connecticut State Board of Labor Relations often follows the NLRB's lead, so the reasoning in this decision may be applied to state and local government employees here as well.

### **Questions or Assistance:**

If you have questions regarding the Board's finding or its impact, please contact Gary Starr at [gstarr@goodwin.com](mailto:gstarr@goodwin.com) or (860) 251-5501 or Jarad Lucan at (860) 251-5785 or [jlucan@goodwin.com](mailto:jlucan@goodwin.com).

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One Constitution Plaza  
Hartford, CT 06103-1919  
860-251-5000

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300 Atlantic Street  
Stamford, CT 06901-3522  
203-324-8100

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265 Church Street - Suite 1207  
New Haven, CT 06510-7013  
203-836-2801

---

289 Greenwich Avenue  
Greenwich, CT 06830-6595  
203-869-5600

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1875 K St., NW - Suite 600  
Washington, DC 20006-1251  
202-469-7750

[www.shipmangoodwin.com](http://www.shipmangoodwin.com)