The risks associated with unauthorized audio and video recordings to companies’ proprietary data, confidential business information, and trade secrets, as well as to customers’ and employees’ privacy interests have always existed. Yet, in recent years, these risks have significantly increased given the widespread use of smart phones and other compact, easy-to-use audio and video recording devices that allow for the near-instantaneous sharing of digitally recorded data with others in a myriad of electronic formats. In response, many employers maintain employee conduct rules limiting audio and video recordings in the workplace. However, the National Labor Relations Board (NLRB) has found such workplace recording rules to be unlawful under the National Labor Relations Act (NLRA).

In one recent case, Whole Foods Market Group, Inc., 363 N.L.R.B. No. 87 (Dec. 24, 2015), a three-member panel of the NLRB struck down the grocery store’s rule prohibiting employees from recording conversations, phone calls, and company meetings without prior approval of management or all parties to the conversation give their consent, despite the fact that the express purpose of the rule was to encourage open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust. While finding such stated business justifications “not without merit,” the NLRB found them insufficiently persuasive or compelling to justify the rule’s scope.

According to the NLRB, the rule unqualifiedly prohibited all workplace recordings, thus impermissibly chilling employees in the exercise of their Section 7 rights, which the NLRB explained includes recording images of protected picketing; documenting unsafe workplace equipment and hazardous working conditions; documenting and publicizing discussions about terms and conditions of employment; documenting inconsistent application of employer rules; and recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions.

The NLRB also noted that its case law is replete with examples where covert photography and recordings are "an

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essential element in vindicating the underlying Section 7 right.” Whole Foods, 363 N.L.R.B. No. 87, slip op. at 3-5.¹

In footnote 14 of its Whole Foods decision, the NLRB indicated it was not holding that employers are always prohibited from maintaining rules regulating recordings in the workplace, only that such rules must be narrowly drawn so that employees will reasonably understand that Section 7 activity is not being restricted.

However, other than to distinguish its decision in Flagstaff Medical Center, 357 N.L.R.B. No. 65 (2011), where the NLRB found that a hospital policy prohibiting the use of cameras did not violate the NLRA because of its stated rationale of protecting patients’ privacy interests and well-understood HIPAA obligations, the NLRB’s Whole Foods decision, provides little guidance on how employers may craft sufficiently narrow workplace recording rules, similar to the scant guidance it offered in a similar case decided four months earlier.

See Caesars Entertainment, 362 N.L.R.B. No. 190, at 3-5 (Aug. 27, 2015) (finding that Rio All-Suits Hotel and Casino’s rules providing that “camera phones may not be used to take photos on property without permission from a Director or above,” and “[c]ameras, any type of audio visual recording equipment and/ or recording devices may not be used unless specifically authorized for business purposes (e.g. events)” were unlawfully overbroad and not tied to any particularized interest, such as the privacy of its patrons, such that employees are left to draw the reasonable conclusion that the rules prohibit their use of audiovisual devices in furtherance of their protected concerted activities).

According to the NLRB, T-Mobile’s rule runs afoul of the NLRA because it did not differentiate between recordings protected by Section 7 of the NLRA and those that are not and prohibited recordings made during non-work time and in non-work areas. With respect to the employer’s stated reasons for the rule, the NLRB found that they did not cure the rule’s overbreadth, because neither the rule nor the stated reasons for the rule were narrowly tailored to protect only legitimate employer interests or to reasonably exclude Section 7 activity from the reach of the prohibition.

Employers seeking to prohibit recordings in the workplace will have to attempt to draft narrower rules with sufficient rationales that are reasonably understood but does not limit Section 7 activity, as well as follow what will undoubtedly be a substantial number of future NLRB cases involving the proper scope of workplace recording rules and monitor the outcomes of enforcement challenges to the same in the federal circuit courts of appeal.

¹Section 7 of the NLRA provides certain workers who meet its statutory definition of an “employee” with the right to engage in various types of activities associated with improving their terms and conditions of employment, including the rights to self-organization; to form, join, or assist labor organizations; to bargain collectively through representatives of their own choosing; and other concerted activities for the purpose of collective bargaining or other mutual aid or protection. See 29 U.S.C. §§ 153, 157.
Former section chairpersons provide workplace medical marijuana presentation to state advisory commission

On March 23, 2016, two of the Section of Labor and Employment’s former chairpersons, plaintiffs’ attorney Robert Spretnak and defense counsel Edwin Keller, appeared before Nevada’s Advisory Commission on the Administration of Justice to address issues associated with the employer accommodation obligations under NRS 453A.800 for employees engaging in the medical use of marijuana pursuant to a valid registry identification card.

The advisory commission is a statutorily created entity charged with examining various aspects of Nevada’s legal system and providing comprehensive reports, including findings and any recommendations for proposed legislation, to the Nevada Legislature.

Nevada Supreme Court Justice James Hardesty, the current chairperson of the advisory commission, had previously attended the Section’s CLE program on medical marijuana in the workplace at the State Bar of Nevada’s 2015 Annual Meeting in Seattle presented by the Section’s current Chairperson, JP Kemp, along with Section Executive Committee members Matt Cecil and Eddie Keller.

Justice Hardesty requested a similar presentation be provided for the benefit and consideration of the advisory commission, which is in the process of empaneling a medical marijuana subcommittee and assessing Nevada’s medical marijuana laws. Video recordings of the Advisory Commission’s meeting are accessible on the Nevada Legislature’s website.

Spretnak and Keller’s presentation (starting 1 hour, 33 minutes, into the meeting on March 23) can be viewed by clicking on the following link: http://nvleg.granicus.com/MediaPlayer.php?view_id=14&clip_id=5615.

Disclaimer

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Recent EMRB Decisions

Item 812; Case 2015-003; John Ducas v. Las Vegas Metropolitan Police Department. John Ducas was a police officer who worked for LVMPD. In 2014 he suffered a work-related back injury, which ultimately placed him on light duty. This light duty assignment resulted at various times in the changing of his shift and his days off. His desk job also resulted in his having to keep a log of the work he was doing as there was no direct supervision available. He also lost his work-assigned vehicle due to his no longer being in the field. Later he attempted a transfer to another light duty position in a different unit but was instead transferred to a desk job at the Fusion Center, which is a counterterrorism facility. Ducas only worked there one day, claiming it aggravated his back pain. He thereafter filed for and accepted a medical retirement. He thereupon filed a complaint against LVMPD, alleging he had been discriminated against on the basis of his race, white, as his new supervisor was Hispanic. He further claimed that LVMPD discriminated against him on the basis of his handicap, for political reasons (he was conservative and his supervisor and co-workers were liberal), and for personal reasons. The Board found that Ducas failed to make a prima facie case of discrimination on the basis of any of the alleged reasons and that LVMPD made reasonable employment decisions that were in accordance with its established policies and procedures.

Item 813; Case 2015-008; Education Support Employees Association v. Clark County School District. The Board found in favor of Respondent in finding no unilateral change of employment terms and conditions. Respondent changed the hiring criteria of bus drivers for temporary summer assignments and excluded applicants who had used 6 or more days of sick leave during the preceding school year. Complainant argued Respondent engaged in a prohibited labor practice by failing to negotiate the Respondent’s consideration of sick leave usage as a criterion. Respondent contended that NRS 288.150(3) gives them no obligation to negotiate with an employee organization in regards to its hiring decisions. Furthermore, no party argued whether the temporary summer positions were within the scope of the employment agreement. In applying NRS 288.150, the Board determined that the Respondent may adopt whatever reasonable criteria it deems appropriate to facilitate hiring decisions.

Item No. 814; Case No. 2015-001; Bramby Tollen v. Clark County Assoc. of School Administrators and Professional-Technical Employees. Bramby Tollen was the Director of Purchasing for CCSD and a union member. In March 2014 CCSD transferred her to Human Resources. Her union would not file a grievance, claiming that there was no contract violation since she was the same grade. Shortly thereafter she went on an extended medical leave. She then contacted her union, claiming bullying and harassment by CCSD. The union told her it did not handle such claims and to contact the unit in CCSD that investigated such claims. While on leave she applied for, and was accepted for, the position of Director of Purchasing for a county in Washington. She signed a lease and began work there while still on paid leave at CCSD. On August 29th Tollen received a letter from CCSD, asking her to attend an investigative meeting on her “double-dipping.” She contacted her union again and was assigned a representative. Her discussions with her rep led Tollen to submit a retirement letter, which then cancelled the need for the meeting. Shortly thereafter CCSD issued her final paycheck, which withheld sums for sick leave. Then after her retirement a reporter contacted her union. She claimed the union made disparaging comments about her to the press.

The Board dismissed the first two denials of service as being filed beyond the six-month statute of limitations. The Board also found no breach of the duty of fair representation with respect to her claim that the union did not represent her at the investigative meeting in that the union had done what she requested; namely send in her retirement letter. Finally, the Board found no breach with respect to the press as she was no longer a member of the union at that time because of her retirement and thus no longer owed her a duty.

Item No. 815; Case No. 2016-005; Nye County v. Nye County Law Enforcement Management Association. The Board granted Nye County’s petition to withdraw recognition of the union as there were no employees left in the bargaining unit. Since Respondent had no members, this was not a voluntary withdrawal. Moreover, the Board noted that the principle of collective bargaining presupposed that there is more than one eligible person who desired to bargain.

Please note that summaries of recent decisions are provided for informational purposes only and are not intended to substitute for the opinions of the Board. These summaries should not be cited to or regarded as legal authority. The EMRB will provide copies of the decisions upon request. They also may be found on our website.