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NLRB Circuit Breakers

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The National Labor Relations Board ("NLRB") is in transition. There is little doubt that the NLRB of the Obama Administration, which often issued decisions in favor of employee rights and greatly expanded its own jurisdiction, will be transformed once the Trump Administration names new members. Similarly, one can anticipate more conservative federal appeals courts reviewing NLRB decisions. In the interim, assessing the current state of federal labor law will become increasingly challenging.

Two decisions by federal appellate courts last month illustrate the challenge. In one, the First Circuit reversed the NLRB, leaving a fired employee on the outside looking in; meanwhile, on the same day, the Second Circuit affirmed a controversial NLRB ruling which protected a worker who violated a prohibition on recordings in the workplace.

In the first case, *Good Samaritan Medical Center v. NLRB*, the First Circuit was considering an NLRB order that a Massachusetts hospital rehire a worker who allegedly was fired for questioning his need to join a union. While the First Circuit agreed that the employee's comments about union membership -- which were entitled to protection based upon a long line of cases -- were a key part of the conversations that led to his firing, the Court criticized the NLRB for failing to weigh the significance of his "overbearing" personality and general rudeness to colleagues and coworkers. In finding evidence that the employee violated the hospital's civility policy, the First Circuit overturned the NLRB and reversed its Order, which would have required the employee to be rehired.

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Meanwhile, the Second Circuit had a very different view of a very different policy. In *Whole Foods Market Group, Inc. v. NLRB*, the Second Circuit considered an NLRB ruling that prohibited the enforcement of Whole Foods' policies barring employees from making workplace recordings.

The case before the Second Circuit originated with a December 2015 Order from the NLRB which sought to invalidate Whole Foods' policies prohibiting all recording without management approval. The NLRB had ruled that "employees would reasonably construe the language to prohibit" recording -- recording that would be protected by Section 7 of the National Labor Relations Act ("NLRA") involving the rights of employees to engage in concerted activities. Specifically, the NLRB had ruled that such policies would prevent "employees recording images of employee picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, or documenting inconsistent application of employer rules."

Whole Foods said that the stated purpose of its policies was to promote employee communication in the workplace, but the NLRB rejected that analysis, saying that the policies' overbroad language could "chill" employees' exercise of Section 7 rights. This determination was upheld by the Second Circuit, finding that the NLRB "reasonably concluded" that Whole Foods' policies could not stand, as they were not written in a way that would limit the recording restrictions to those activities in which employees are not acting in concert.

It should be noted that the NLRB decision from which the appeal to the Second Circuit was taken was issued by a split board, with the NLRB Chairman writing a strong dissent in which he asserted that a "reasonable employee would understand" that Whole Foods did not intend to infringe on Section 7 activity, but simply intended "to promote open, free, spontaneous and honest dialogue" among workers.

Takeaways

Based on the Second Circuit ruling, if your company or your clients have policies restricting recordings in the workplace, they should be reconsidered at this time. Overly broad policies that may "chill" Section 7 concerted activities are routinely stricken, and that is not expected to change any time in the near future.

"Stay tuned," as the evolution of the NLRB bears watching. To the extent that policies and procedures have been reformed by your company or clients in recent years to comply with the Obama-era NLRB, a loosening of restrictions by a Trump-era NLRB may allow you to revisit such modifications. A "new" NLRB has not yet taken form, but the evolving NLRB and the courts that interpret its rulings bear watching.

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