

Employer Alert: Banning Recording in the Workplace Could Infringe on Employee Rights

03/24/23

Under the [National Labor Relations Act](#) (“NLRA”), all non-management employees have a right to engage in actions “for the purpose of concerted activity or mutual aid or protection (‘Section 7 rights’).” Banning recording in the workplace could infringe on that right.

Current State of the Law Regarding Prohibiting Recording in the Workplace- AT&T Mobility, LLC (2021):

In the [AT&T Mobility](#) case, the employer’s no recording rule stated as follows:

“Employees may not record telephone or other conversations they have with their co-workers, managers or third parties unless such recordings are approved in advance by the Legal Department, required by the needs of the business, and fully comply with the law and any applicable company policy.”

In the *AT&T* case, an employee, a union shop steward, recorded the termination meeting of a union member, for the purpose of using the recording for a prospective grievance and in his role as a union representative.

The Board determined that the employer’s legitimate interests in its no recording rule outweighed the potential interference of the rule with employees’ Section 7 rights. The Board explained that the employer’s no recording policy was lawful because it was instituted as a result of the employer’s responsibility and legal duty to safeguard customer information.

The Board cited another case with which it agreed in order to support its ruling. In *Flagstaff Medical Center, 357 NLRB 659 (2011)*, the employer’s rule prohibited employees from using cameras to record patients or hospital property, equipment or facilities. The Board determined the rule was lawful because the employer, a medical center, had “substantial patient confidentiality interests” and there was only “comparatively slight” potential interference with Section 7 rights. The Board also provided examples in its decision of other legitimate justifications for employer work rules including: maintaining production, protecting the employer’s reputation and business from improper threats, securing the employer’s premises, preventing workplace harassment, promoting workplace civility, and protecting employees from rumor mongering and bullying.

Ultimately, the Board ruled against the employer, but not because of the policy itself, which the Board held was legal, but because the employer threatened the shop steward with discipline if he were to engage in recording again in order to restrict the shop steward from exercising his Section 7 rights. The Board did not order the employer’s policy to be deemed unlawful and removed. Instead, it ordered the employer to cease and desist applying its no-recording policy to restrict the exercise of Section 7 rights.

New Jersey State Law:

There is no New Jersey law that prevents a private employer from restricting employees from recording at the workplace. However, an employer cannot run afoul of federal law as explained above.

However, there is one caveat to the above. New Jersey law specifically forbids a person from recording conversations of others when the person is not a party to the conversation. Thus, an employer is allowed to

restrict employees from recording a conversation between other employees when the employee is not a party to the conversation. [N.J.S.A. 2A:156A-4](#).

Takeaway:

An employer may institute a policy stating its employees cannot record in the workplace if there are legitimate justifications for the rule. An employer must also ensure that the policy is not enforced when doing so would restrict employees from exercising their Section 7 rights. For example: if an employee was involved in a discussion with management about a workplace issue such as overtime or an increase in pay, the employer would violate the [NLRA](#) if the employer were to discipline the employee for recording the conversation.

If you need clarification on the National Labor Relations Act, another federal law, or New Jersey employment law, contact [Stephanie Gironda](#) or any member of the Wilentz [Employment Law](#) Team.

Attorney

- Stephanie D. Gironda

Practice

- Employment Law