LABOR & EMPLOYMENT
Newsletter

January 2016 Issue

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Can Employers Prohibit Surreptitious Recording? In *Whole Foods* Case, NLRB Says No

by Tom H. Luetkemeyer

Most of us immediately recognize the Whole Foods Market brand, and some of us even may have shopped in one of their stores from time to time. By most accounts, the stores are both consumer-oriented and employee-friendly environments. Thus, Whole Foods probably thought it was doing nothing wrong by maintaining a general workplace rule that prohibited the recording of conversations in the workplace without the consent of all the parties or management approval. In fact, by prohibiting such recordings, management at Whole Foods believed it was promoting frank and open discourse.

Whole Foods' handbook makes it a workplace violation to record conversations, phone calls, images, or company meetings with any recording device. The policy expressly states that the purposes of the rule are to encourage "open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust," and to "eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversations with another are being secretly recorded" because this concern "can inhibit spontaneous and honest dialogue, especially when sensitive or confidential matters are being discussed." The United Food and Commercial Workers, Local 919, and the Workers Organizing Committee of Chicago nevertheless disagreed and filed an unfair labor practice charge, alleging that Whole Foods committed an unfair labor practice under the National Labor Relations Act because the rule allegedly interfered with employees' right to engage in protected and concerted activity under Section 7 of the Act.

An NLRB administrative law judge recommended dismissing the charge after a hearing in which only one witness testified. That sole witness was Whole Foods' Global Vice President for Team Services (i.e., an HR executive). That executive testified that the rule is part of the company's "core values" and "culture" and that employees have a voice and are free to "speak up and speak out" on many issues. He further testified that the open-door policy at Whole Foods encourages employees to provide input into their work and that workers should "feel very

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comfortable" in voicing their opinions. He cited specifically to Whole Foods town hall meetings held periodically when local store management is not present. If employees record comments made at those meetings, it might "chill the dynamic," the executive stated, because workers would be reluctant to voice their opinions about store management. He also cited to the company's internal appeal process for employment termination decisions which could be adversely affected without a no-recording policy. Under that process, employees threatened with termination can request a review of a decision by a five member panel of their "peers"; the executive testified that allowing recordings could have a detrimental effect on panel deliberations. Finally, he testified to meetings at which employees' requests for monetary assistance from a common fund are discussed and resolved, pointing out that these matters are often confidential and involve financial need, family death, illness, or other personal crisis.

Notwithstanding the arguably laudable purposes of the no-recording policy, the NLRB disagreed with the administrative law judge: a majority of the members decided that this rule would unreasonably tend to chill employees in the exercise in the Section 7 rights. The Board majority noted that it previously held that photography and audio or video recordings in the workplace are protected by Section 7 if employees are acting in concert for their mutual aid and protection. Similarly, the Board majority found, the "overbreadth" of the rule made it unlawful because it did not differentiate between recordings protected by Section 7 and those that are unprotected.

The majority specifically based its decision on its prior holding in a case called *Lutheran Heritage Village*. Under that decision, if a rule explicitly restricts activities by Section 7, it is unlawful. If it does <u>not</u> explicitly restrict such activities, there is no violation unless either: (i) employees would reasonably construe the language to prohibit Section 7 activity; (ii) the rule is promulgated in response to union activity; or (iii) the rule has been applied to restrict the exercise of Section 7 rights. In this particular case, the question was whether the employees would reasonably construe the language of the policy to prohibit or restrict Section 7 activity. The Board majority never addressed this question head on, however, and there certainly was no testimony—even from a single employee—who said that he or she felt constrained in the exercise of their Section 7 rights. Nevertheless, the Board majority was uncomfortable with the overreach of the policy and declared it unlawful, requiring Whole Foods to post a notice of the unfair labor practice as well as publish to all employees rescissions of its policies.

The case stands as the current NLRB policy and is notable for two reasons. First, *Whole Foods* follows a string of recent Board decisions which have found employer policies unlawful if they are overly broad and possibly could be interpreted to restrict Section 7 activity. Second, it is clear that this Board is not hesitant to state unequivocally how a "reasonable" employee might react, even in the absence of any testimony or evidence relating to management enforcement, management communication about the policy, disciplinary history on violations of the policy or employee complaints.

New IRS Initiative Highlights Trust Fund Tax Compliance Issues

by Anthony E. Antognoli

The IRS has begun a new initiative focused on employers' timely deposit of "trust fund" taxes, i.e., payroll and income taxes withheld from employees' paychecks and turned over to the IRS by employers. Under this new initiative, called the Early Interaction Initiative, the IRS will take a more proactive approach to dealing with unusual payroll tax deposits using its Federal Tax Deposit (FTD) Alert program, which for many years has been used to alert employers whose payroll tax deposits have declined. The new IRS initiative will monitor deposit patterns and identify employers whose payments decline or are late, then contact them: IRS may send a letter reminding an employer of its payroll tax responsibilities and asking that it contact the IRS, or an IRS revenue officer may contact the employer at their place of business. The initiative should not have much of an impact on employers who are current with their payroll tax obligations, for obvious reasons—those who are contacted by the IRS, however, should promptly work to resolve any issues with their deposits. Ultimately, employers who fail to timely submit their trust fund taxes may be subject to civil or criminal liability, as well as personal liability for those individuals who are responsible for collecting and depositing the trust fund taxes. Correcting potential problems before they get out of hand will allow employers to avoid these more serious consequences.

Employer Wellness Program Survives EEOC Attack

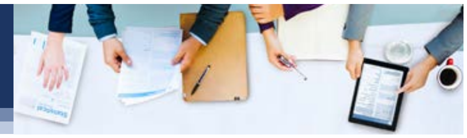
by Tom H. Luetkemeyer

A Wisconsin Federal District Court Judge found against the EEOC with respect to its allegations that an employer acted unlawfully by requiring its employees to submit to medical examinations as a condition of participation in the employer's self-funded health insurance plan. In *Equal Employment Opportunity Commission v. Flambeau, Inc*., the employer had adopted a policy of offering health insurance only to those employees who completed a risk assessment and underwent a biometric screening (i.e., a physical exam). Participation in the wellness program was not a condition of continued employment, but it was a condition of receiving health insurance benefits. The EEOC believed this policy violated the Americans with Disabilities Act (ADA), in particular the ADA's provision prohibiting employers from requiring their employees to submit to medical examinations that are not "job-related." The employer responded that its program fell within the ADA's savings provision, which states that the Act shall not be construed to prohibit an employer from establishing or administering the terms of a *bona fide* benefit plan that is based on underwriting risks, classifying risks or administering such risks. The federal judge in this case found that the employer's plan clearly fell within the savings provision of the exemption. This case highlights the importance of making sure that, if participation in health insurance benefits is conditioned on participation in a wellness plan, an employer must properly coordinate its wellness plan with existing employee health insurance plan documents and provisions.

Seventh Circuit Reiterates Standard for Establishing Substantial Limitation on the Ability to Work

by Elizabeth A. Odian

In its decision in *Carothers v. County of Cook*, the Seventh Circuit answered an important question: when does a disability limit an employee's ability to work for the purposes of the Americans with Disabilities Act (ADA)? An ADA plaintiff must show that a disability "substantially limits" one or more "major life activities." In this case, a hearing officer who worked with juvenile offenders claimed that her anxiety prevented her from interacting with children, which was necessary for her job, and therefore that she was unable to work as a result of the anxiety. The Seventh Circuit rejected her argument, emphasizing that the ADA required her to show that her condition prevented her from performing not just her current job but a "class" or "broad range" of jobs. In this case, the court concluded, her inability to perform the unique aspects of her particular job was not enough to show a substantial limitation on her ability to work in many jobs. Therefore, her anxiety disorder did not constitute a "disability" within the meaning of the ADA.



Final Revised Overtime Exemption Rules Coming in July 2016

by Evan J. Bonnett

In its "Semiannual Regulatory Agenda" for Fall 2015, the Department of Labor has stated that its Final Rule implementing expanded FLSA overtime eligibility will be published in July 2016. Those new rules, which will likely take effect immediately upon or shortly after release, are expected to more than double the salary threshold for an exemption from the current $455 a week to $970 a week and, for the first time, to index that salary threshold in order to keep up with inflation. Importantly, when finally released in July 2016, the Final Rule could also contain some changes we have not yet seen—as part of proposed rules, for example, the DOL sought comments regarding whether it should also change the duty tests used to determine if workers are exempt. Stay tuned.

New Jersey Issues New Rules Regarding "Ban the Box" Law

by Gregory S. Glickman

On December 7, 2015, the New Jersey Department of Labor and Workforce issued regulations to enforce and more specifically define the restrictions contained in the State's "Opportunity to Compete Act." While the Act went into effect on March 1, 2015, the Department's new rules are the first issued. In short, the Act prohibits New Jersey employers from making any inquiry concerning an applicant's criminal record until after conducting a "first interview." The new regulations define a "first interview" as any live, direct contact between the employer and applicant, whether by telephone, video conferencing, or in person. The rules also clarify the expansive definition of "inquiry" under the Act; an "inquiry" includes, for example, a search of publicly available records (including Internet searches) or a third party background check.