LEGAL UPDATES

PUBLISHED: MARCH 15, 2011

Happy Valentine's Day - NLRB Rules Secretly Tape-Recording May be Okay

Services

Labor & Employment

Traditional Labor Relations

Professional

TERRY L. POTTER
ST. LOUIS:
314.345.6438
TERRY.POTTER@
HUSCHBLACKWELL.COM

On Valentine's Day this year, the National Labor Relations Board (NLRB) issued an order that was far from a sweetheart deal for most employers. In *Hawaii Tribune-Herald*, 356 NLRB No. 63, the Board found that an employee could not be discharged for secretly tape-recording a meeting with a supervisor, as the employer had not only violated the employee's *Weingarten* rights[1], which were invoked in concert with the wishes of his co-workers, there was no work rule in place barring such recordings, and it was not otherwise unlawful to make such a recording in the state where the incident took place. The key to this finding by the Board is that the employee was found to be acting in concert with other employees in invoking his *Weingarten* rights. In other words, the decision has a relatively narrow focus.

However, given the speed that such decisions make their rounds across the internet, for employers this decision will undoubtedly result in some unions informing their members to secretly tape-record any conversations with their managers that might be relevant to any workplace issues, regardless or whether the issue is common to other employees or in a disciplinary context. Even if a union is not in the picture, some employees will, after hearing of this decision, think it appropriate to secretly record workplace conversations without regard for the facts under which this case was decided. With cell phone technology being what it is today, employees can easily record or videotape such conversations or other supervisory acts going on in the workplace.

What This Means to You

This decision points out the need for properly drafted work rules regarding workplace confidentiality, including records to which employees may have access, or discussions during meetings at which they are in attendance where confidential matters are discussed. The NLRB has, in recent years, been very

active in striking down overly broad work rules in this area[2], but those which are carefully crafted can easily do the job. In addition, this case points out the fact that rules which are promulgated and enforced in direct response to concerted, protected activity[3], will almost always be found unlawful by the Board. Most commonly, this is seen in the context of no solicitation/no distribution rules being implemented in the face of the union organizing campaign. In the *Hawaii Tribune-Herald* case, the rule was implemented in the face of an employee attempting to invoke his *Weingarten* rights. So, it is important to have these rules in place. Now is the best time to reexamine employee handbooks and work rules. Flag collective bargaining agreement provisions for change or supplementation when these agreements expire.

[1] *Weingarten* Rights: A specific kind of protected concerted activity. The right of employees to have union representation at an investigatory meeting which the employee reasonably believes may result in discipline. Limited to union workplaces.

[2] *See Steeltech Mfg*., 315 NLRB 213 (1994). Work rule prohibiting non-disclosure of confidential information unlawful as overly broad.

[3] Protected concerted activity. A term derived from § 7 of the NLRA, which provides the basis for employees' rights in both union and non-union work environments.

Contact Info

For additional information and assistance, please contact your Husch Blackwell attorney.

Husch Blackwell LLP regularly publishes updates on industry trends and new developments in the law for our clients and friends. Please contact us if you would like to receive updates and newsletters, or request a printed copy.