

COURT AFFIRMS NLRB DECISION STRIKING DOWN WORK RULE REGULATING WORKPLACE PICTURE TAKING

By: Donald H. Scharg, Member, Workplace Law Practice Group

In December 2015, the National Labor Relations Board ("NLRB") issued its decision in *Whole Foods Market* which struck down an employer's work rule which prohibited employees from audio and video recording, and taking photographs, in the workplace without prior management approval. According to the NLRB, the work rule was overbroad because its requirement of management approval could deter employees from using a smart phone to document unsafe workplace equipment or hazardous working conditions, or other workplace

activity the employee had a right to document for later use in employment-related court or agency actions. This NLRB ruling applies to both union and nonunion workplaces and can affect every employer in the country.

The employer appealed the NLRB ruling to the Second Circuit Court of Appeals. On June 1, 2017, in *Whole Foods Market Group, Inc. v. NLRB*, the appeals court agreed with the NLRB's decision invalidating the work rule. The Court focused on the requirement of management approval, agreeing with the NLRB that "employees would reasonably construe the language to prohibit" all

protected recording activities and chill employee labor law rights.

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The appellate court's decision affirming the NLRB is disappointing for employers, but not unexpected. *There may be a silver lining!* The court did not approve a total ban on the regulation of audio and video recording and photographs in the

workplace or prohibit all management approval requirements. The door is left open for carefully drafted work rules meeting the employer's need to regulate some recording and picture taking while balancing federally protected employee rights.

Contact a member of Bodman's Workplace Law Group if you are interested in implementing a work rule.

Case: *Whole Foods Mkt. Group, Inc. v. NLRB*, No. 16-0002 (2d. Cir. June 1, 2017).



About the Author. *Donald H. Scharg has more than 30 years of experience in the areas of labor law, construction labor law, employment discrimination, and employee relations. He has represented employers in collective bargaining contract arbitrations, 312 arbitrations, wrongful discharge, and discrimination claims. Don has conducted many seminars for management on employment discrimination, sexual harassment, wrongful discharge, family leave, and other topics. He also regularly contributes articles to professional and business publications regarding employment law issues.*

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