Client Alert | Employment, Compensation & Benefits

Updates in Federal Employment Law

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No-Recording Policies at Work Must Be Limited

On June 1, 2017, the United States Court of Appeals for the Second Circuit held in *Whole Foods Market Group, Inc. v. National Labor Relations Board* that the federal National Labor Relations Act ("NLRA") restricts the ability of companies to maintain broad policies prohibiting employees from recording or videotaping in the workplace.

Section 7 of the NLRA—which applies to both unionized and non-unionized workplaces—permits employees "to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." Whole Foods had established policies that generally banned all recording of conversations in the workplace without prior management approval. The Second Circuit stated that employees would reasonably construe such policies to prohibit recording that is protected by Section 7 of the NLRA. The Second Circuit noted that the "overbroad language" in Whole Foods' policies is "not limited to controlling those activities in which employees are not acting in concert." Rather, the Second Circuit noted that these policies may prevent "'employees recording images of employee picketing, documenting unsafe workplace…conditions, documenting and publicizing discussions about terms and conditions of employment, or documenting inconsistent application of employer rules,' without management approval."

Despite its rejection of the particular Whole Foods policy that was before it, the court expressly stated that not every no-recording policy will violate the NLRA and that "[it] should be possible to craft a policy that places some limits on recording audio and video in the work place that does not violate the [NLRA]." Employers who wish to limit workplace recording should craft their policy with close involvement of counsel.

DOL Withdraws Joint Employment and Independent Contractor Guidance

Undoing two actions taken under President Obama's administration that employers had widely viewed as regulatory overreach, the US Department of Labor ("DOL") recently withdrew two Wage and Hour Administrator's Interpretations from 2015 and 2016 on independent contractors and joint employment. The 2015 DOL guidance discussed misclassification of employees as independent contractors and concluded that "most workers are employees" under the Fair Labor Standards Act. The 2016 guidance stated that joint employment "should be defined expansively." Although the DOL has withdrawn these expansive interpretations, the DOL press release states that "[r]emoval of the administrator interpretations does not change the legal responsibilities of employers under the Fair Labor Standards Act" and that DOL "will continue to fully and fairly enforce all laws within its jurisdiction, including the Fair Labor Standards Act…." The DOL's withdrawal of their previous guidance is indicative of a shift to less regulation espoused by President Trump's administration.

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