

# SEX TAPES AREN'T JUST FOR CELEBRITIES... EMPLOYEES ARE GETTING FREE PASS TO SECRETLY RECORD

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With the new age of smart phones and the ability to record someone without their knowledge, also comes the headache of operators dealing with sneaky employees trying to secretly record co-workers when they get into an argument or managers when they are terminating an employee's employment—without the other person's consent. This may not be as exciting as celebrity sex tapes, but it is still a new dilemma for employers every day. In many states, all parties must consent to being audio recorded. In some states, only one person must consent to the recording (i.e., the person doing the recording). It only needs to happen one time where an employee secretly records a discipline or termination meeting before an operator responds with a policy that says "No recording of another employee allowed." Seems reasonable, right? An operator should be allowed to enforce this reasonable work rule, right?

Well, the decision may have been made for us—unionized or not. The National Labor Relations Board has, once again, struck down work rules the Board deemed overly broad. This time, the employer is Whole Foods Market and the rules at issue essentially barred employees from photographing or making audio or video recordings during working hours—that is, when employees were being paid to do their assigned work. These

rules did not apply while employees were on break. Again, this seems to be a very reasonable rule—we pay the employees to work, not record one another while we also protect the privacy of an employee being recorded without his or her consent.

The NLRB's rationale for striking down various employer policies in recent years has hinged on protecting employees' rights under the National Labor Relations Act to engage in "concerted activity for mutual aid or protection." For example, the NLRB has struck down rules barring employees from discussing their wages or from engaging in certain social media activity regarding one's employment because those discussions, in the NLRB's eyes, are concerted activity protected by law—something an operator is prohibited from discouraging.

Interestingly, no employee was even disciplined for violating the no recording rule at issue in this most-recent case—and there was no accusation that the rule actually infringed on any employee's right to engage in concerted activity for mutual aid or protection. There also was no evidence that any employee even believed that the rules prohibited protected concerted activity. Nevertheless, the NLRB felt it necessary to ban these rules based on the possibility that employees might believe the rules prohibited the recording of, for instance, picketing or unsafe working conditions—things that may generally be considered protected concerted activity.

One of the more interesting aspects of the decision, aside from the fact that no one was harmed by the rule, is that the NLRB dodged the issue of whether the rule would be enforceable in states where at least some of the prohibited recording is illegal under state law. Whole Foods argued that in some of the states in which it does business, it is illegal to record a private conversation without the consent of all parties involved in the conversation. The NLRB, apparently having no interest in issuing a decision with any nuance, rejected that argument (with no acknowledgement of the irony) because such laws were not in effect in all of the states in which Whole Foods operated.

Also interesting is the fact that the NLRB did not overrule prior precedent in which no-camera rules were upheld in a hospital setting. The rationale for that prior precedent was essentially that the privacy of hospital patients and their medical information outweighed potential concerns over employees' protected concerted activity.

With all of that in mind, it is likely that some no-recording rules could survive NLRB scrutiny. The key to drafting enforceable rules will be making them apply to a narrow set of circumstances. Circumstances that, ideally, are already protected by existing laws on consent for recording, or which can be tied to significant privacy interests, like medical patient privacy or, perhaps, the protection of trade secrets—although the NLRB's decision is unclear as to whether the protection of trade secrets would be a valid basis for a no-recording rule.

The bottom line is that employers implementing broad no-recording policies that could be misconstrued to cover protected employee activity face a considerable risk that those rules will be deemed unenforceable by the NLRB—if you are unionized or not. As such, we recommend that operators work closely with experienced legal counsel to craft no-recording rules that closely align with operational needs and other applicable laws, and at the same time make clear that the rules will not infringe on employees' rights under the NLRA. ■

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All Star Services helped support the people of Flint, Michigan, with much-needed bottled water donations as the city faced a water crisis this winter.

During the month of February, the family-owned company based in Port Huron, Michigan, donated one bottle of water for each bottle purchased at its 30 market division locations throughout the Southeast region of the state.

"My son, Devin Smith, All Star's Purchasing/Market Division Manager, spearheaded the idea for this program," said Jeff Smith, All Star President and CEO.

"Our hearts go out to the residents of Flint and we wanted to support them any way we could. Bottled water is a resource many of us take for granted and through this program, we are hoping to spread awareness on the crisis, secure clean water donations and inspire others to add their support," he continued.

"We worked with All Star customers at each of our 30 sites. To promote awareness of the program, we posted notices on kiosks and at point-of-sale. There is even a button for consumers to donate an entire case of water to this cause."

#### **About All Star Services**

Family owned and operated since 1963, All Star Services provides full service vending, micro markets and office coffee services to 31 counties in southeastern Michigan.