Do Employees Have the Right to Electronically Monitor Their Employers?

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In November 2016, I co-authored an article which discussed technologies available to employers for monitoring employee conduct, as well as some legal limitations on doing so. On the flip-side of that issue, employees may want to use technology, such as audio and video recorders on their cell phones, to record fellow employees, supervisors and events in the workplace. The exact nature and scope of employee rights to monitor the workplace is still being decided in the courts. As always, the particular facts of a case make a difference in the outcome. Below are a few issues to be aware of when writing employment policies or making individualized decisions regarding employee's monitoring.

TOTAL BANS ON EMPLOYEE RECORDING LIKELY UNLAWFUL

An employer policy which totally bans all electronic recording by employees in the workplace likely violates the National Labor Relations Act. Under the Act, workers in both unionized and non-unionized workplaces generally have the right to *engage in concerted activity for the purpose of mutual aid and protection*. An employer violates the Act if it has written policies which contradict this right. An employer also violates the Act if the employee could reasonably construe the employer's written policy as restricting this right. Several cases interpreting the Act have held that total bans on all electronic recording in the workplace could be reasonably construed as restricting employees' rights. For example, a total ban could be reasonably construed to prevent the recording of workplace health and safety violations, protected picketing, and unfair labor practices.

SOME LIMITS ON RECORDING LIKELY LAWFUL

Employers have legitimate interests and enforceable rights to limit employee recording in some situations. For example, policies which specifically prohibit employees from recording patients in a medical setting have been found to not violate the Act. It is not difficult to imagine other narrowly drawn policies which likely would not violate

the Act, such as prohibitions on the recording of business trade secrets or other confidential business information.

INDIVIDUAL ACTIVITY NOT FOR MUTUAL AID OR PROTECTION

Generally, when an employee is acting on his own, without the authority of other employees, and solely on his own behalf, the employee is not engaged in concerted activity for the purpose of mutual aid and protection. Accordingly, an employer policy or decision which prohibits employees from recording private meetings with the employer to discuss individual performance improvement plans may not violate the employees' right to engage in concerted activity for the purpose of mutual aid and protection. Ultimately, whether an act of recording is protected under the Act will turn on the specific circumstances of each case.

Some employee monitoring of the workplace may involves the exercise of other employee rights under the Act, such as the right to enforce the provisions of a collective bargaining agreement or to induce group action. When faced with the issue of employee monitoring in the workplace, the labor and employment lawyers at Foster Swift can help you make good HR decisions which comply with the Act.