

# T-Mobile USA, Inc.

## 363 NLRB No. 171 (2016)

By Chairman Pearce and Members Hirozawa and McFerran

### Decision and Order

[ \* \* \* ]

The consolidated complaint alleges that numerous provisions in written work rules and policies applicable to the Respondent's employees are unlawful. An employer violates Section 8(a)(1) of the Act if it maintains workplace rules that would reasonably tend to chill employees in the exercise of their Section 7 rights. The analytical framework for assessing whether maintenance of rules violates the Act is set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under *Lutheran Heritage*, a work rule is unlawful if "the rule explicitly restricts activities protected by Section 7." If the work rule does not explicitly restrict protected activities, it nonetheless will violate Section 8(a)(1) if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."

The rules at issue before us are not alleged to explicitly restrict protected activities or to have been promulgated in response to or applied to restrict Section 7 activities. Thus, the relevant inquiry is whether employees would reasonably construe the challenged rules to prohibit Section 7 activity. In construing rules, *Lutheran Heritage* teaches that they are to be given a reasonable reading, and are not to be considered in isolation. Further, any ambiguity in the rule must be construed against the drafter—here, the Respondent.

[ \* \* \* ]

[W]e find that the Respondent [ ... ] violated Section 8(a)(1) by promulgating and maintaining rules in its employee handbook [ ... ] prohibiting employees from making recordings in the workplace.

[ \* \* \* ]

[S]ince at least January 16, 2014, the Respondent promulgated and has maintained the following handbook rule prohibiting employees from making recordings in the workplace:

To prevent harassment, maintain individual privacy, encourage open communication, and protect confidential information employees are prohibited from recording people or confidential information using cameras, camera phones/devices, or recording devices (audio or video) in the workplace. Apart from customer calls that are recorded for quality purposes, employees may not tape or otherwise make sound recordings of work-related or workplace discussions. Exceptions may be granted when participating in an authorized TMUS activity or with permission from an employee's Manager, HR Business Partner, or the Legal Department. If an exception is granted, employees may not take a picture, audiotape, or videotape others in the workplace without the prior notification of all participants.

The General Counsel alleged that the rule violates Section 8(a)(1) because it unlawfully restricts employees from using cameras and audio and recording devices in the workplace to assist in, support, and get evidence of protected concerted activity. In recommending dismissal, the judge stated that the Board had not previously found a Section 7 right to record in the workplace. The judge also found that the Respondent had set forth valid, nondiscriminatory rationales for the rule, including maintaining a harassment-free work environment and protecting trade secrets, and that the rule was narrowly tailored to these interests. For the following reasons, we reverse the [ALJ] and find the violation.

After the [ALJ]'s decision issued, the Board issued decisions in *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190 (2015), and *Whole Foods Market*, 363 NLRB No. 87 (2015), finding that employer rules broadly prohibiting recording in the workplace on employees' own time and in nonwork areas restricted Section 7 activity in violation of Section 8(a)(1) of the Act. As the Board explained in those decisions, photography and audio or video recording in the workplace, as well as the posting of photographs and recordings on social media, may be protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. Such protected conduct may include, for example, recording images of protected picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions.

The rule at issue here bans employees from recording "people or confidential information using cameras, camera phones/devices, or recording devices (audio or video) in the workplace" and, except for calls that the Respondent records for quality purposes, prohibits employees from making "sound recordings of work-related or workplace discussions." The rule does not differentiate between recordings that are protected by Section 7 and those that are not, and includes in its prohibition recordings made during nonwork time and in nonwork areas. The Respondent does not deny that the rule prohibits all recording and makes no exception for protected concerted activity. Accordingly, because of the rule's broad language, employees would reasonably read the

rule to prohibit recording that would be protected by Section 7 of the Act.<sup>1</sup>

The Respondent contends that the recording restriction is justified by its general interest in maintaining employee privacy, protecting confidential information, and promoting open communication. That the Respondent's proffered intent is not aimed at restricting Section 7 activity does not cure the rule's overbreadth, as neither the rule nor the proffered justifications are narrowly tailored to protect legitimate employer interests or to reasonably exclude Section 7 activity from the reach of the prohibition. As for protecting "confidential information," the Respondent has not excepted to the judge's findings that it unlawfully maintained other rules classifying employee information, including employee contact information and wage and salary information, as confidential. The Respondent also asserts that its recording prohibition is in place to prevent harassment and notes that, under federal and state laws, employers have an affirmative obligation to prevent harassing conduct. But the recording prohibition is not narrowly tailored to this interest; it neither cites laws regarding workplace harassment nor specifies that the restriction is limited to recordings that could constitute unlawful harassment.<sup>2</sup> Thus, the Respondent's proffered rationales cannot justify the rule's broad restriction that employees would reasonably read as prohibiting activity protected by Section 7. See *Whole Foods* (finding employer's interests in preserving employee privacy, protecting confidential information, and encouraging open communication insufficient to justify broad and unqualified prohibition on recording).<sup>3</sup>

Accordingly, we find that employees would reasonably construe the rule to restrict activity protected by Section 7 of the Act, and that the Respondent's promulgation and maintenance of the rule violates Section 8(a)(1) of the Act as alleged.

[ \* \* \* ]

*Editor's Note: On appeal, the D.C. Circuit affirmed this part of the Board's decision. T-Mobile USA, Inc. v. NLRB, 865 F.3d 265 (D.C. Cir. 2017).*

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<sup>1</sup>(n.11 in Decision) In addition, the Respondent's maintenance of the rule unlawfully requires employees to obtain the Respondent's permission before engaging in recording activity on nonwork time. The Board has stated that any rule that requires employees to obtain an employer's permission before engaging in protected concerted activity on an employee's free time and in nonwork areas is unlawful.

<sup>2</sup>(n.12 in Decision) The Respondent also argues that nonconsensual recording is unlawful in many of the states in which it operates. The Respondent's rule, however, is not limited to these states. Moreover, the rule does not refer to these laws or indicate that the restriction is limited to recordings that do not comply with state laws."

<sup>3</sup>(n.13 in Decision) In contrast, in *Flagstaff Medical Center*, the Board found restrictions on workplace recording to be lawful because the restrictions reasonably conveyed that they concerned the hospital's obligation to protect patient privacy interests and prevent wrongful disclosure of individually identifiable health information. No such concerns are present here.