United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: March 9, 2017

TO: Valerie Hardy-Mahoney, Regional Director
Region 32

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Kaiser Foundation Health Plan, Inc., et al.
Case 32-CA-169979

512-5012-0125-0000
512-5012-0133-1600
512-5012-9300-0000

This case was submitted for advice as to whether a health maintenance organization's policy restricting audio, digital, and video recordings violates Section 8(a)(1). We conclude that the policy is unlawfully overbroad because it is not tailored to protecting patient privacy and its consent requirement is not justified by a state statute criminalizing eavesdropping.

FACTS

Kaiser Foundation Health Plan, Inc. is a nonprofit health maintenance organization that provides care to plan members through various hospitals, clinics, and outpatient facilities operated by Kaiser Foundation Hospitals, Southern California Permanente Medical Group, and The Permanente Medical Group, Inc. (collectively, "Employer," d/b/a "Kaiser Permanente"). The Employer currently operates in eight states and the District of Columbia through regional subsidiaries. Local 20 of the International Federation of Professional and Technical Engineers ("Union") represents laboratory professionals, optometrists and optometric assistants, and genetic counselors employed by The Permanente Medical Group, Inc. in three separate bargaining units in California.

On August 21, 2015, an Employer representative emailed the Union a copy of its "revised [Kaiser Permanente] national policy on electronic usage." According to section 3.0 of the Electronic Asset Usage policy, the policy applies to employees of all of the Employer entities and their subsidiaries. Section 5.3.8 of the policy, in relevant part, states:

> [e]mployees may not make audio, digital or video recordings of [Kaiser Permanente] premises, or of [Kaiser Permanente] personnel, patients or their family members, with personal or

> [Kaiser Permanente] Electronic Assets, without the consent and authorization of all who are being recorded. Consent is implied or is not required in certain limited situations, such as [Kaiser Permanente] security system recordings and [Kaiser Permanente]-authorized events (e.g., Town Hall events, executive leadership forums, [Kaiser Permanente] Compliance awareness fairs, retirement award celebrations, [and Kaiser Permanente] Thrive events).

The Employer interprets the above rule to prohibit an employee from, hypothetically, taking an unauthorized video of a memo concerning terms and conditions of employment that is posted in an employee-only breakroom, because the video might capture a patient file inadvertently left out on a break room table and disclosure of such a video would violate the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").[1]

ACTION

We conclude that the Employer's policy on employee recordings unlawfully restricts Section 7 activity because it is not tailored to the Employer's legitimate interest in protecting patient privacy and its consent requirement is not justified on state law grounds.

The maintenance of a rule that would reasonably have a chilling effect on employees' Section 7 activity violates Section 8(a)(1).[2] The Board has developed a two-step inquiry to determine if a work rule would reasonably tend to chill protected conduct.[3] First, a rule is clearly unlawful if it explicitly restricts Section 7 activities.[4] Second, if it does not, the rule will violate Section 8(a)(1) only upon a showing that: (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.[5] In determining how an employee would reasonably construe a rule, particular phrases should not be read in isolation, but rather considered in context.[6] A rule that is ambiguous as to its application to

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[1] 42 U.S.C. § 1320d-6 (2010).

[2] *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced,* 203 F.3d 52 (D.C. Cir. 1999) (table decision).

[3] *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004).

[4] *Id.* at 646.

[5] *Id.* at 647.

Section 7 activity and contains no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights is unlawful.[7] Finally, any ambiguity in an employer's rule is construed against the employer as the promulgator of that rule.[8]

Photography and audio or video recording in the workplace are protected by Section 7 if employees are acting in concert for their mutual aid and protection and the employer does not have an overriding interest in prohibiting such conduct.[9] Examples of protected conduct include recording images of protected picketing, documenting unsafe equipment or working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, and recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions.[10] Whether a recording garners protection under the Act does not turn on whether the employee obtained the consent of all parties to a conversation, and an employer cannot require that employees secure management's permission as a precondition to

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[6] *Id.* at 646.

[7] *See University Medical Center*, 335 NLRB 1318, 1320-21 (2001) (work rule that prohibited "disrespectful conduct towards [others]" unlawful because it included "no . . . limiting language [that] removes [the rule's] ambiguity and limits its broad scope"), *enforcement denied in relevant part sub nom. Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079 (D.C. Cir. 2003). *See also Schwan's Home Service*, 364 NLRB No. 20, slip op. at 5 (June 10, 2016) (work rule that subjected employees to discharge for, among other things, engaging in conduct "detrimental to the best interests of the company or its employees" unlawful because rule was broadly worded and contained no examples or limiting language other than an "amorphous reference to 'best interests'").

[8] *See Lafayette Park Hotel*, 326 NLRB at 828 (citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992)).

[9] *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 3 (Dec. 24, 2015) (rules prohibiting the recording of conversations, phone calls, images, or company meetings without prior approval or without all parties' consent violated Section 8(a)(1)); *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 4 (Aug. 27, 2015) (rules banning photography on employer property without permission and the use of recording devices except for authorized business purposes unlawfully overbroad).

[10] *Whole Foods*, 363 NLRB No. 87, slip op. at 3.

engaging in protected concerted activity.[11] Indeed, covert recordings have been instrumental in vindicating employees' Section 7 rights.[12]

In *Flagstaff Medical Center*,[13] the Board found a hospital rule banning "[t]he use of cameras for recording images of patients and/or hospital equipment, property, or facilities" to be lawful.[14] The Board reasoned that employees would reasonably interpret the rule as a "legitimate means of protecting the privacy of patients and their hospital surroundings" as opposed to prohibiting protected activity.[15] In so finding, the Board noted the weighty privacy interests of hospital patients and the employer's significant interest in preventing the wrongful disclosure of individually identifiable health information under HIPAA.[16]

We conclude that the Employer's recording policy is unlawfully overbroad because it is not tailored to its legitimate interest in protecting patient privacy. The rule effectively prohibits all recordings "of [the Employer's] premises" or "of [the Employer's] personnel" without the subject's and/or Employer's consent, regardless of the proximity of patients or the risk of exposing sensitive patient information. It is clear that the policy would cover recordings of employee-only activities, since the Employer explicitly exempted certain workplace events, such as Town Hall events and retirement celebrations, from its coverage. Thus, unlike in *Flagstaff*, patient privacy does not appear to be the Employer's foremost concern, especially since the policy does not mention patients at the outset but only after Employer "personnel." Rather, the policy would clearly preclude the kind of activities the Board deems protected, such as recording protected picketing and concertedly documenting evidence in an employment-related action.[17] The Employer admits that it interprets the policy to prohibit the unauthorized videotaping of a memo related to terms and conditions in an employee breakroom, purportedly out of concern that

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[11] *Id.*, slip op. at 3-4, nn.9 & 10.

[12] *See id.*, slip op. at 3 & n.8 (collecting cases).

[13] 357 NLRB 659 (2011), *enforced in part*, 715 F.3d 928 (D.C. Cir. 2013).

[14] *Id.* at 662-63.

[15] *Id.* at 663.

[16] *Id. But see id.* at 670 (Member Pearce, dissenting) (concluding that the rule is unlawful because employees would construe it as banning all photography of hospital property, including concertedly photographing an unsafe working condition).

[17] *See Whole Foods*, 363 NLRB No. 87, slip op. at 3.

patient information might be inadvertently visible. The Employer does not contend that patient information is routinely exposed in this manner, and even assuming such circumstances do arise, the policy could be tailored more narrowly to accomplish the objective of protecting patient information without chilling Section 7 activity. Accordingly, we conclude that employees would reasonably read the policy as prohibiting Section 7 activities without the subject's and/or Employer's consent.

Additionally, we find that the consent and authorization requirements amount to unlawful preconditions for engaging in Section 7 activities and cannot be justified based on California law.[18] In *Whole Foods*, the Board rejected a similar defense because the employer's rules were applicable to stores in states that did not require all-party consent for recordings, the rules did not reference any state laws, nor did they specify that the restrictions were limited to recordings that failed to comply with state law.[19] Here, the Employer contends that its recording policy is justified by the California eavesdropping statute, which treats nonconsensual recording of "a confidential communication" as a criminal offense.[20] This argument fails, however, for the same reasons as in *Whole Foods*. The Electronic Asset Usage policy extends to the Employer's facilities across the country, as recognized on the face of the policy and the Employer representative's characterization of the revised policy as a "national" one. The policy does not reference the California eavesdropping statute, and it fails to reassure employees that it is merely coextensive with state law. Indeed, the policy is plainly more restrictive than the state statute. In this regard, it requires consent to make any recordings of the premises or of personnel, and is therefore not limited to communications, let alone those where the participants have an expectation of privacy.[21] We reject the Employer's argument that employees and

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[18] *See id.*, slip op. at 3-4, nn.9 & 10.

[19] *Id.*, slip op. at 4 n.13.

[20] *See* CAL. PENAL CODE § 632(a), (c) (West 2017) (defining "confidential communication" as "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive, or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded").

[21] Employees would reasonably construe the policy as extending to photography as a form of "digital" recording. Thus, the policy is also overbroad because certain protected photos, such as a cell phone picture of an unsafe working condition, would not capture any "communication" as contemplated by the eavesdropping statute. *See People v. Drennan*, 84 Cal. App. 4th 1349, 1359 (Cal. Ct. App. 2000) (holding that

patients alike have an expectation of privacy as to all communications in a health care setting, except as to certain workplace meetings that are specifically exempted from the policy. While patients undoubtedly expect privacy in immediate patient care areas, there are many other areas on the premises of medical facilities where employees and patients would "reasonably expect that the communication may be overheard," such as in hallways, breakrooms, cafeterias, and garages, and on public sidewalks.[22] Thus, the Employer's policy sweeps too broadly, even accounting for the California eavesdropping statute.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by maintaining an overbroad recording policy.

/s/
B.J.K.

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taking still photos of people engaged in a confidential communication is not a violation of the California eavesdropping statute).

[22] CAL. PENAL CODE § 632(c). *See also generally Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 495, 499-500 (1978) (upholding the right of employees to engage in Section 7 activity in "areas other than immediate patient-care areas" on hospital premises).