Trust Issues: NLRB General Counsel Says No to Secretly Recording Bargaining Sessions

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In a world where it is far too easy to click 'Record', National Labor Relations Board (NLRB) Acting General Counsel William Cowen has pressed 'Delete' on a party's ability to secretly record a collective bargaining session. In a recent General Counsel Memorandum issued to Board Regional Directors and offices,[1] Cowen made the prosecutorial stance clear: a party that secretly records a collective bargaining session breaks the trust of all involved and commits a *per se* violation of Sections 8(a)(5) and 8(b)(3) of the National Labor Relations Act (the "Act"). Parties that secretly press 'Record' anyway now risk having a Regional Director bring a complaint against them for bad faith violations of the Act.

Trust the (Bargaining) Process

Foundationally, Cowen explains throughout the memo that "trust is essential in both personal relationships and professional environments." Extending that notion to the Act, trust at the bargaining table is essential to foster the good-faith collective bargaining negotiations required under the Act. While acknowledging that the National Labor

Relations Board (the "Board") has not addressed the specific issue of surreptitious recordings of collective bargaining sessions as a standalone violation of the Act, Cowen argues in his memo that a brightline rule barring secret recordings is necessary to protect parties' trust in the bargaining process and promote free and genuine discussions at the table.

In support, Cowen relies heavily on the Board's decision in *Bartlett-Collins Co.*, where the Board held that insistence to impasse on a court reporter recording bargaining sessions constituted an unfair labor practice and was a *per se* (i.e. "by itself") violation of Section 8(a)(5) and (b)(3) of the Act.[2] Cowen also cites *Bakery Workers Local 455*, where six years after *Bartlett-Collins*, the Board found that insisting on tape-recording a bargaining session constituted an unlawful refusal to bargain in good faith under Section 8(b)(3) of the Act.[3] Per Cowen, secretly recording a bargaining session is a natural extension of the Board's decision in *Bartlett-Collins*. Specifically, since the Board held that the insistence of a court reporter during negotiations and the insistence on tape-recording is unlawful under the Act, it is logical that the Board would find that clandestinely recording a bargaining session is not only a blatant disregard for good faith negotiations, but also a *per se* violation of the Act.

I-Spy No More

Cowen explains that today's technology makes it incredibly easy for a party to secretly and accurately record a bargaining session without the other party even being aware. Pointing to devices such as personal recording devices, cell phones, tablets, computers, wearable devices, wireless microphones, and even artificial intelligence, Cowen juxtaposes Board decisions and emerging technologies as to why a brightline rule is needed. Cowen notes the ease and secrecy with which a person today can record bargaining sessions: "[i]n today's world, the proliferation of recording devices and AI enhancements can affect parties' ability to engage in free, open good faith bargaining when recordings are done without knowledge or consent." Cowen explains that anything short of a brightline rule, making surreptitious recording a *per se* violation of the Act, would conflict with the Board's responsibility to safeguard bargaining and could cause parties at the negotiation table to be fearful that their conversations might be secretly recorded and used against them. Preventing distrust between the parties is crucial in order to keep the spirit of the Act alive during bargaining sessions and to foster meaningful collective bargaining where parties confer in good faith.

Cowen's memo provides not only clear direction for Regional Directors moving forward, but also a warning for parties during negotiation: secretly recording collective-bargaining session(s) is a chargeable *per se* of Sections 8(a)(5) and 8(b)(3) of the Act. While most of us dreamed of being a spy when we were kids, the time to work on surveillance skills is not during a bargaining session—unless you want to talk to those of us who dreamed of becoming a lawyer.

If you have any questions about the Act, please contact Michael J. Lufkin (mlufkin@lippes.com), Robert G. Riegel, Jr. (rriegel@lippes.com), or any member of our Employment Practice Team.

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[1] NLRB, General Counsel, GC Memorandum 25-07 (June 25, 2025).
[2] *Bartlett-Collins, Co.,* 237 NLRB 770, 772–773 (1978).

[3] *Bakery Workers Local 455 (Nabsico Brands),* 272 NLRB 1362 (1984).