



*The sample forms provided as part of this presentation are intended merely for informational purposes. No representation is made as to the enforceability of these forms in any jurisdiction, and the materials should not be relied upon or construed as legal advice, or as a substitute for obtaining legal advice from an attorney licensed in the applicable jurisdiction(s).*

### **Model Photography and Recording Policy**

Two sample model photography and recording policies appear below, which have been prepared in light of *Boeing*, 365 NLRB 154 (2017) (no-photography policies are lawful when justified by legitimate business reasons), and GC Memo 18-04 (interpreting *Boeing* as holding that no-photography policies are “always lawful” and extending same analysis to no-recording policies). That said, please review the following two important caveats:

1. Even in the post-*Boeing* world, employers still must be strongly cautioned not to apply such policies to protected concerted activities (such as disciplining an employee for taking picture of unsafe working conditions), since such application would still violate the NLRA. If you are deciding whether to discipline or discharge anyone for violating your photography/recording policy in the future, evaluate whether the photography/recording in question relates to employees’ working conditions and could thus implicate the NLRA.
2. Obama-era NLRB decisions held an employer cannot prohibit all photography and recording on company property because employees may have a right to engage in certain protected photography/recording (e.g., taking a picture of an unsafe working condition to share with their coworkers). Additionally, while GC Memo 18-04 is helpful guidance regarding the current NLRB GC’s enforcement position with respect to no-photography and no-recording policies, it is not binding upon the NLRB. While the Obama-era NLRB decisions on photography/recording pre-date *Boeing* and GC Memo 18-04, employers may still wish to opt for the more conservative Policy #2 below.

Below are two draft policies. The first prohibits all photography/recording, consistent with *Boeing* and GC Memo 18-04. The second is a more conservative policy. Both policies are low-risk under the current law.

#### **Photography and Recording Policy (Version 1)**

In order to protect the confidentiality of our trade secrets, the sensitive consumer financial information in our possession, and our confidential business information (i.e., our confidential processes, techniques, and systems, our strategic business plans, and our non-public sales and profit data\*), employees are prohibited from taking photographs or making recordings on Company property at any time. This includes recording telephone calls, except where authorized by management for legitimate business purposes.

\*The more tailored and specific the examples, the better. In the alternative, the policy can refer to “Confidential Information” as defined in your policy on confidentiality, as long as that policy is not overly broad.

#### **Photography and Recording (Version 2)**

Employees are prohibited from taking photographs or making video or audio recordings during their working time. This includes recording telephone calls, except where authorized by management for legitimate business purposes. Working time is the time employees are expected to be working, and does not include rest, meal, or other authorized breaks.

Additionally, in order to protect the confidentiality of our trade secrets, the sensitive consumer financial information in our possession, and our confidential business information (i.e., our confidential processes, techniques, and systems, our strategic business plans, and our non-public sales and profit data), employees are prohibited from taking photographs or making recordings in working areas at any time.

If you have any questions about this form, please contact: John T. Merrell | Greenville, SC | Telephone: 864-240-8233 | E-mail: [john.merrell@ogletree.com](mailto:john.merrell@ogletree.com)

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