

WIRED FOR SOUND: THE INS AND OUTS OF WORKPLACE RECORDINGS

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Consider the all-too-real scenario of meeting with your employee for a disciplinary discussion. At the start of the meeting, he innocently puts his phone face down on the table. Unbeknownst to you, however, anticipating the meeting may result in some disciplinary action, the employee records the discussion and subsequently sends the recording to his lawyer. What should you do?

WORKPLACE RECORDINGS IN THE SPOTLIGHT

Secret workplace recordings remain a prevalent practice, and thanks to recent high-profile examples in the news, your employees and managers likely believe recordings are a valid tactic to employ for their benefit. For example, President Trump is dealing with secret recordings from two of his former confidantes—his former lawyer, Michael Cohen, and former staffer, Omarosa Manigault-Newman.

Also, in Simone Grimes' sexual harassment lawsuit against Federal Housing Finance Agency Director Mel Watt, she has released audio recordings of Watt's urging of an exploration of what he believed was an "attraction" between the two. These situations exemplify the severity of legal issues that can arise as a result of surreptitious recordings: whistleblower laws, privacy concerns, national security implications, and attorney-client privilege issues.

When you add the fact that ample technological capabilities—from smartphones to digital recorders in pens—provide employees with ready access to record others secretly in the workplace, it makes sense for employers to implement policies addressing this issue. Many employers recognize

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that recordings, especially secret ones, can make it difficult to cultivate trust in the workplace. As a result, many employers have policies prohibiting recordings at work.

The National Labor Relations Board (NLRB) has recently revised the legal test analyzing whether such policies violate the National Relations Act (NLRA). Thus, if you are one of the many employers who have policies prohibiting recordings in the workplace, you should be mindful of current legal standards and reassess whether you need to adjust your rules and practices. Further, if you have opted not to utilize such a policy before, now may also be the time to incorporate an applicable set of rules.

WHEN CAN WE PROHIBIT WORKPLACE RECORDINGS IN THE WORKPLACE UNDER THE NLRA?

Pursuant to Section 7 of the NLRA, employees have a right to engage in concerted activity. This includes activity performed for the employees' mutual aid or protection, such as discussing the terms and conditions of employment. Under the NLRA, it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees from exercising their rights under Section 7. An issue arises when an employer's policy has the effect of interfering, restraining, or coercing employees from exercising their Section 7 rights.

As illustrated by a recent pronouncement by the NLRB in the [*Boeing Co.*](#) case, employers have the ability to enforce policies prohibiting recordings in the workplace without running afoul of the NLRA in certain instances. In that case, the Board considered whether the employer's policy prohibiting the use of cameras violated the NLRA and ultimately found the policy permissible. The issue in that case was whether the company's "no-camera rule" was legitimate. Management provided evidence that it needed to maintain accreditation as a federal contractor to perform classified work for the federal government, and as such needed to demonstrate strict security protocols. The company also argued that this rule was necessary to prevent disclosure of proprietary information, protect employees' personally identifiable information, and limit the risks of becoming a target of a terrorist attack. These justifications were sufficient in the Board's view to permit the rule and allow the employer to prohibit pictures and video recordings.

This decision came as a welcome relief given where the state of the law was at the time. Prior to the December 2017 *Boeing* case, the NLRB applied the *Lutheran Heritage* standard for assessing facially neutral employer policies, concluding that many commonplace workplace rules violated federal law. In fact, in the past, the Board struck down a workplace rule if it concluded that employees could “reasonably construe” the policy to prohibit Section 7 activity, if the rule was promulgated in response to union activity, or if the rule was applied to restrict the exercise of Section 7 rights. Additionally, some courts, such as [the 5th Circuit Court of Appeals](#), applied this standard to find policies that prohibit recordings of people or confidential information in the workplace—even in order to “prevent harassment, maintain individual privacy, encourage open communication, and protect confidential information employees”—as violating the NLRA.

But under [the new Boeing standard](#), the Board now places more weight on NLRA-protected rights without considering an employer’s legitimate justifications for policies, rules, and handbook provisions. No longer will facially neutral policies be invalidated, the Board said, solely because they are ambiguous in some respect. Instead, the Board will evaluate (1) the policy’s potential impact on protected concerted activity, and (2) the employer’s legitimate business justifications for maintaining the rule. If the justifications for the rule outweigh the potential impact on employees’ rights, the workplace rule will be deemed lawful.

WHEN THE SHOE IS ON THE OTHER FOOT: EMPLOYER RECORDINGS

Setting aside employee recordings—whether they are secret or not— there may be instances where employer-made recordings may serve a purpose. They may be helpful, for instance, during investigations to ensure all pertinent information and statements of individuals are preserved immediately, rather than trying to rely on the poor memory of others at a later time. If you can relate to the familiar phrase, “I can’t even remember what I did this morning,” then certainly you understand the benefits of recording witness statements.

That said, an employer’s use of recording conversations can have its pitfalls. Recordings can be seen as threatening and can potentially affect workplace morale. This can be an issue if the purpose of the conversation is to build rapport.

Further, while the majority of jurisdictions utilize the one-party consent rule for recordings (meaning any participant to a conversation can legally record the exchange), at least 11 jurisdictions require all party consent for recordings.

Generally, consent for recording is only required in circumstances where there is a reasonable privacy expectation. While the majority of jurisdictions and federal law only require consent from only one party to legally record an exchange, issues with recording can become complex; especially when dealing with several participants and multiple jurisdictions. In cases of doubt, it is recommended to follow the law of the jurisdiction with the strictest requirements. Additionally, the converse of the one-party consent federal rule affirms that non-parties to a conversation can only record said communication if at least one party consents and has full knowledge that the conversation will be recorded. Recording communications for a criminal or tortious purpose is also precluded.

If you have questions about the states in which your business operates, contact your Fisher Phillips attorney for a review of the local consent laws.

SO WHAT SHOULD EMPLOYERS DO?

Given the *Boeing* standard, you should feel empowered to implement policies on recording that dissuade employees from creating environments lacking trust and sound employee relations. However, you should be mindful of how far a recording ban infringes on individual rights. Whatever you decide, you should train your managers and employees about the need for the policies and the consequences of breaking your rules.

Some tips for the implementation of lawful policies include the following:

- Consider the locations in which employees subject to said policies are located. At least 11 jurisdictions—including Florida and California—require all-party consent for recordings. Accordingly, multistate employers need to craft policies considering all their locales, especially if they want to utilize recordings in certain situations.
- Ensure there is a legitimate business justification for the policies that outweigh the impact on protected concerted activity.

- As a follow-up to the previous tip, ensure that any rules prohibiting recording by employees confirm that recording is permissible for purposes of addressing specific grievances, protests, unsafe or hazardous conditions, or other areas of concern (unless there is a legitimate business justification).
- Train employees, especially supervisors, to be mindful at all times of statements they make in the workplace, as disgruntled or poor-performing employees are sometimes known for secretly recording conversations.

Because employment policies may present legal concerns even after revising them, it is always a good idea to discuss any proposed revisions to workplace policies with your legal counsel before implementation.

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