

Blog Post

Covert Employees: Recording Conversations at Work

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Can an employee secretly record conversations with a co-worker, supervisor, human resources manager or executive and use that recording in a claim or lawsuit against his/her employer? It depends.

First, where you live is important. While the federal Wiretap Act, as amended by the Electronic Communications Privacy Act of 1986, permits recording as long as one party consents, *state laws* covering audio surveillance vary widely. In some states only one party need consent to the recording, but in other states both / all parties to the recording must consent. If you're in a "one-party" consent state, you are generally permitted to record a conversation even without the other person's knowledge or consent, whereas in a "two- or all-party consent" state, recordings need the consent of all parties involved.

Most states and the District of Columbia require only one party to consent (Alabama, Alaska, Arizona, Arkansas, Colorado, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon^[1], Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming). Eleven states currently require the consent of all parties (California, Connecticut^[2],

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Delaware, Florida, Illinois, Maryland, Massachusetts, Montana, Nevada, New Hampshire, Pennsylvania, and Washington). Michigan requires all-party consent but one Michigan case interpreted that law to mean that a participant in a conversation can record the communication without the other party's consent, but eavesdropping is prohibited.^[3] And Vermont has no statute addressing the topic, but the Supreme Court of Vermont held that secretly recording an in-person communication in a person's home is considered an unlawful invasion of privacy.^[4]

But what if an employee in a "two- or all-party" consent state secretly records a conversation and attempts to use that in a claim or lawsuit against the employer? What now? While an employer may argue that the recording should be barred as it was made without its consent, some government agencies have disagreed. For instance, the Department of Labor has taken the position that an employee's surreptitious recording of workplace safety issues is protected "whistleblowing" activity under the Energy Reorganization Act. Also, the Securities and Exchange Commission Rule 21F-17 prohibits actions or measures that may impede an individual from communicating with the SEC about possible securities law violations. This could well mean that the SEC may give weight to secret recordings, even though the employee did not obtain the other party's or employer's consent.

Could an employer prohibit its employees from recording conversations at work without all parties' approval? A memo that the National Labor Relations Board's General Counsel issued earlier this year states that policies prohibiting recording of conversations without approval are generally permissible. However, employers must be cautious in implementing such a policy, as a federal appellate court last year concluded that an employer's "no-recording" policy was unlawfully overbroad and could "chill" employees' right to engage in protected activities under the National Labor Relations Act.

Further, in Title VII discrimination cases, while the EEOC has taken the position that an employee's recording of a supervisor's alleged harassment was protected activity, courts have also ruled in favor of employers. For example, a Texas court dismissed an employee's discrimination and retaliation claims although the employee presented evidence – recordings of conversations with supervisors – to support his claims. The Texas court found that because the employee violated the employer's "no-recording" policy, the employer was able to articulate a legitimate, non-discriminatory reason for terminating the employee.

This topic indeed invites questions and concerns, particularly with the near-universal presence of smartphones. Employers should familiarize themselves with audio surveillance laws and consult with counsel to discuss when issues arise.

[1] In Oregon, electronic communications only require one party to consent; in an in-person communication, all parties must be notified or informed. Or. Rev. Stat. Ann. §165.540 and § 165.535.

[2] In Connecticut, civil cases require all parties' consent while criminal cases only require one party to give consent. C.G.S.A. §53a-187, §53a-189, and §52-570d.

[3] *See Sullivan v. Gray*, 117 Mich. App. 476, 324 N.W.2d 58 (1982).

[4] *See Vermont v. Geraw*, 173 Vt. 350, 795 A.2d 1219 (2002).

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