

Pros and Cons of Recording Conversations

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By Steve Taylor

It's easier than ever to record a conversation without anyone knowing that it's being done.

Most smart phones, many cell phones and even some mp3 players have an audio feature called "voice memo" or something similar.

On an Apple iPhone, for example, the feature can be turned on with one tap of the screen, followed by a tap of the record button. A tiny microphone at the device's edge can capture a nearby conversation in a quiet room. After a few seconds, the phone's screen goes blank but the recording continues.

Consider this scenario:

An employee reports to an office or conference room for a disciplinary session. There sits the phone, apparently inactive, on the table next to the employee's knapsack or purse. Unbeknownst to the manager or HR person, the employee records the session and, as soon as the conversation is over, e-mails the recording to a lawyer.

What can—and should—the HR professional do about it?

It depends, experts say, on whether the employee disclosed that the recording was being made and obtained consent to do so.

Don Phin, president of the consulting firm HR That Works in Coronado, Calif., said, "Some 38 states allow single-party consent. In those states, employees can record away [with an] iPhone in the pocket."

However, the remaining states require that all parties to a conversation agree to the recording. "That puts that employee in a bad spot if they in fact record it [secretly]," said Phin. Not only may the employee have broken the law, but if he or she tries to use the recording in a legal proceeding, it might not be admissible. "They think they have a case but immediately find themselves having fingers pointing back at them."

So what happens when the HR professional discovers that the employee is recording the disciplinary meeting secretly? Can the company take action?

The answer is yes, but only after they confirm it is safe to do so, from a legal perspective.

Employment law attorney Claud (Tex) McIver of Fisher & Phillips in Atlanta cited a recent National Labor Relations Board case in which a company terminated a worker who recorded a meeting with his supervisor secretly. "The board found that the employee consulted with his co-workers prior to recording the meeting, thereby making the recording a 'concerted activity,' " a legal term referring to an activity workers may partake in without fear of employer retaliation.

"Moreover," McIver went on, "because the employer waited until after the meeting to implement a formal policy prohibiting unauthorized recordings, the board found that the employer's policy was meant to deter employees from engaging in protected concerted activity and constituted a separate violation" of the National Labor Relations Act.

"At a minimum," McIver concluded, "the employer should have a clear policy prohibiting unauthorized photography or audio or video recording in place before taking any action against an employee for engaging in such conduct."

When the Employee Makes a Request

Must an HR professional allow an employee to make an electronic record of a meeting if the employee asks for permission to do so?

"The law does not require an employer to allow an employee to record disciplinary proceedings, and we typically advise employer clients not to permit an employee to do so," replied lawyer William R. Knowlton of the Foster Group in Tempe, Ariz.

Some companies have signed labor agreements that provide for recording disciplinary sessions. If, for that or any other reason, the company decides to agree to the employee's request, Knowlton said, "We strongly recommend the employer record the proceedings as well—so as to avoid any tampering with the record."

When the Company Decides to Make a Recording

"The employer can make it a condition of the disciplinary meeting that there will be a recording," said attorney Jay. L. Rosenlieb of the firm Klein, Denatale Goldner Cooper Rosenlieb Kimball in Bakersfield, Calif. "The employee can then choose to participate [or not].

Whether such a policy is good HR practice is another issue," he added.

"I don't see the need for it," said Nancy E. Glube, vice president, business Solutions for Dale Carnegie in Atlanta. "I've gone through a zillion disciplinary meetings without recording, and the right things happened and it wasn't challenged and it was fine."

"It's such a private conversation and you're trying to build trust," said Janice Green, HR director for Scripps Treasure Coast Newspapers in Stuart, Fla. "The intention of the meeting is to improve their performance, not to build a legal case."

And even when building a legal case is the intention, "The recording can become a giant albatross of interpretation by attorneys, and it can just exacerbate the problem," said Timothy A. Dimoff, president of SACS Consulting and Investigative Services based in Akron, Ohio. "It's better to have a conversation and put in writing what was discussed and agreed to and have both parties sign it."

"In general, I'm not a big fan of recording anything," said Phin. However, he observed, "If people are threatening, if they're ranting or their meds didn't kick in, it's important that you get that on the record." He also noted, "People are less apt to be threatening if they're being recorded."

Lawyers say it is in the company's best interest to make any such recordings openly, whether disclosure is required by law or not. If the recording is done surreptitiously, the worker will be more likely to be able to make a legal case that his or her reasonable expectation of privacy was violated.

Group Sessions and Surveillance

The laws are similar for recording meetings with groups of employees. Depending on the state in question, employers are required or well-advised to disclose the recording to all participants before or at the beginning of the session. Then, "Their continued presence following the announcement ... is deemed to be consent," said Rosenlieb.

What about cases in which theft or security is an issue?

"Aside from the common-sense exceptions (restrooms, mother's feeding rooms, etc.), an employer has the right to install video and audio surveillance equipment," Knowlton told *SHRM Online*. "However, in an abundance of caution, we typically advise our employer clients to post a notice, preferably in the employee handbook, that the workplace is under surveillance and that the employee does not have a reasonable expectation of privacy."

Here, too, state laws can make a difference.

Rosenlieb said that, apart from restrooms, locker rooms and changing rooms, "California employers can engage in undisclosed video monitoring but not undisclosed audio monitoring."

For more information on state laws regarding workplace monitoring, **[click here](#)**.

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