



DELAWARE

EMPLOYMENT LAW LETTER

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ELECTRONIC MONITORING

Recording workplace communications: What do you need to know?

by Lauren E. Moak

Recording communications in the workplace is an issue that employers face with surprising frequency. However, it's often overshadowed by the more exciting world of online misconduct. Many people have strong feelings about the propriety of recording workplace communications, and it's an area of the law that isn't entirely clear. Here's what you should know to protect your company from liability.

Delaware law

In Delaware, there's some conflict over whether one party to a conversation can record the communication without the other party's consent. Delaware's electronic surveillance statute explicitly permits a person to "intercept a wire, oral or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception." There are limited exceptions, but this statute would seem to permit employers and employees to record workplace communications.

However, Delaware law also criminalizes the act of "violation of privacy," which includes intercepting "without the consent of all parties thereto a message by telephone, telegraph, letter or other means of communicating privately, including private conversation." That means a party to a conversation could *conceivably* be convicted of a crime for recording the conversation without the other party's consent.

What to do, what to do?

So what is an employer to do? There are different answers for each side of the issue. When it comes to recording your employees' communications, just don't do it. There's more than one good reason not to record workplace communications. Not only is the legality of the practice questionable, but it's also likely to be unpopular with your employees. No one likes to learn that what he thought was a private conversation was in fact being recorded. If you do have a particularly problematic employee, a third-party witness can always sit in on sensitive conversations. Just be sure that the witness has a legitimate business reason to be present. HR professionals or other managerial staff members are preferable.

When employees record workplace conversations, you must exercise your discretion in dealing with them. Delaware is an at-will state: You can terminate an employee for lawful conduct that's nonetheless inappropriate in the workplace. If, in the exercise of your business judgment, you determine that there's a good reason to terminate an employee who has surreptitiously recorded workplace conversations, you're free to do so.

However, as with all terminable offenses, it's best to make sure your employees are aware of the types of conduct that are and aren't permitted in the workplace. Although you're free to terminate employees for any lawful reason, you won't be popular if you fire employees for doing something they thought they were allowed to do — and you may be on the hook for unemployment benefits!

Bottom line

It remains unclear under Delaware law whether someone may record workplace conversations to which he is a party without the consent of the other participants. Given that uncertainty, it's best to abstain from recording workplace communications. To address employees who might record workplace conversations, develop a policy and implement it. If you choose to prohibit workplace recording, make sure your employees are aware of the restriction and apply it fairly to all workers.

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