

Recording in the Workplace: Knowing When to Press Play or Stop

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Objectives

- Understand scope of Wisconsin and federal laws governing recording or monitoring in the workplace
- Address policy issues and recommendations regarding video and audio recordings
- Discuss practical recommendations for using recordings in investigations

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Monitoring in the Workplace

- A 2014 American Management Association survey shows 55% employers use video monitoring
- 48% use monitoring to counter theft, violence and sabotage; 7% use it to monitor employee's performance
- Over 75% notify employees of taping

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Secret Recordings in the Workplace on the Rise

- Recordings can be very powerful evidence in lawsuits
- Employees recording work conversations without knowledge or permission
- Use in a variety of contexts, including discrimination, sexual harassment and/or whistleblower lawsuits

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HR Challenges

- When and how can you monitor and use surveillance in the workplace?
- What rights do your employees have to secretly tape conversations or take pictures in the workplace?
- What policies should be in place to address these issues?

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HR Challenge #1

“OMG. Charlie is freaking out on the floor. He’s in the warehouse ranting and raving. Something has to be done. Look at this.”

Shane pulls out his cell phone while walking into your office and shows you a video clip on a cell phone of “Charlie freaking out.”

What do you say? Do you look?

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HR Challenge #1

You decide to look and conclude, “OMG, Charlie *really is* freaking out.” Charlie is your second shift supervisor. He is using foul and colorful language, and is yelling at his staff.

What are your next steps? [Note: Retirement is not an option!!]

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HR Challenge #1

What do you say to Shane?

What do you need to know to take your next steps?

What issues about this recording run through your mind?

How do you handle this situation?

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HR Challenge #2

When you arrive at work, your 3rd shift manager Kyle tells you, “Evan was missing for several hours last night. I don’t know where he was, but now we’re behind schedule. You’ve got to do something about him this time. I can’t go chasing around the whole warehouse looking for people who are supposed to be near their work stations.”

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HR Challenge #2

Later that morning, you look at surveillance tapes from third shift. You see Evan and observe him early in the shift going into an office area where he is completely obscured from the camera.

He comes out 27 minutes later and appears unsteady on his feet. Then, you see him actually fall down and struggle to get up.

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HR Challenge #2

What do you do with the surveillance camera information and what do you need to know to take your next steps?

What issues about using the surveillance tape run through your mind?

How do you handle this situation?

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HR Challenge #3

Sheila, a long-term employee approaches you to tell you she has been sexually harassed by a married male co-worker. She says they had a consensual relationship that broke off months ago, but he is still pursuing her.

You begin your investigation and Karl, the accused employee, provides you with emails, texts and pictures of his consensual relationship with Sheila. He also provides you with several conversations that he recorded.

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HR Challenge #3

How do you proceed?

What issues or concerns do you have about the information provided?

How do you approach the investigation?

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Federal Law

- The Federal Wiretapping/Electronic Communications Privacy Act allows states to define acceptable video monitoring practices in the workplace
- Exception: Assertion of Section 7 Rights under the National Labor Relations Act

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NLRA Protected Video Activity

- Recording images of protected picketing
- Documenting unsafe workplace equipment or hazardous conditions
- Publishing discussions about terms and conditions of employment including management discussions

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NLRA Protected Video Activity

- Documenting inconsistent application of employer rules
- Recording evidence to later use in judicial or administrative proceedings

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The Boeing Decision Upholds No-Camera Policy

- New Standard Adopted by NLRB
- December 14, 2017 Decision
- Upholds Boeing’s no-camera rule
- Overrules prior holdings that found maintenance of such policies violated NLRA Section 7 Rights

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No-Camera Policy in Boeing

- Policy restricted employees’ use of cell phones, laptops and other camera-enabled devices on its property without a valid business need and an approved Camera Permit that has been reviewed and approved by Security
- Devices were allowed on company property

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No-Camera Policy in Boeing

- Policy developed because of security concerns for classified and highly sensitive work performed at facilities and evolved over years as technology changed
- Policy did not explicitly restrict any activity protected under Section 7 of the NLRA, allowing employees to engage in protected concerted activities

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No-Camera Policy in Boeing

- Upon review, an ALJ held that the policy violated Section 8(a)(1) of the NLRA and held it was invalid
- NLRB overturned ruling on 12/14/2017 holding that the business justifications for the no-camera policy outweighed adverse effect on employees' exercise of Section 7 rights

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NLRB's Majority Holding

- Adverse impact of no-camera rule on NLRA rights is minimal
- Business reasons included security protocols, federal regulation compliance, nondisclosure of proprietary information and personally identifiable information and limiting risk of terrorist attacks

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Photography and Recording Policy Prohibitions under NLRA

- Clarify recordings are permitted to address grievances or other terms and conditions of concern and policy is not intended to chill exercise of NLRA rights
- Otherwise, rules limiting recordings and photos are generally permissible

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Wisconsin Privacy Law

- Recognizes an individual right to privacy and allows individuals to recover equitable relief, compensatory damages and attorneys' fees if privacy is invaded
- Wis. Stat. § 995.5 addresses Right to Privacy
- Provides 4 grounds for invasion claim

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Invasion of Privacy Includes

1. **Highly offensive intrusion on privacy** in a place a reasonable person would consider private
2. **Using a person's name or likeness** for advertisement or purposes of trade without having first obtained written consent

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Invasion of Privacy Includes

- 3. **Publicity about private life events** if violator acts recklessly or unreasonably as to a legitimate public interest in the matter
- 4. **Depiction of nudity** when person has a reasonable expectation of privacy

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Publicity of Private Events Proof

- Private information must be disclosed to a substantial number of people or smaller group in certain situations (like co-workers)
- Information must be nonpublic
- Subject matter must be highly offensive to a reasonable person
- Disclosure was reckless or unreasonable

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Wisconsin Law on Recordings

- Unlawful to intercept or attempt to intercept any wire, oral or electronic communication or to use or disclose any intercepted communication **unless one** of the parties to it provides consent
- Unlawful to install or use a surveillance or recording device in any private place

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Wisconsin Law on Recordings

- Employers that own or operate a locker room must adopt a written policy that: (1) must specify who can enter and remain in the locker room; (2) must detail recording devices that may be used under what circumstances; and (3) must reflect privacy interests of users and prohibit cell phone use to record in the locker room

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Policy Considerations About Secret Taping

- Promotion of trust and candid conversations
- Include termination for violating policy
- Will support legitimate non-discriminatory termination and “after acquired evidence” argument if discovered after lawsuit starts

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Policy Recommendations for Taping in the Workplace

1. No employees may record conversation without his or her full knowledge and consent (ban)
2. Secret recordings are strictly prohibited without written authorization from legal counsel (limited use)

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Policy Recommendations for Taping in the Workplace

- 3. Prohibition against recording unless:
 - a) A legitimate purpose exists
 - b) Recording device is in plain view
 - c) Written authorization has been obtained by the supervisor of the employee wishing to record the conversation

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No Policy—What Happens?

- Admissibility of the tape will be based on FRCP and FRE
- FRCP 56(c)(2) allows objections to evidence that cannot be presented in a form that is *admissible*
- FRE 901(a) requires authentication by sufficient supporting evidence

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Key Takeaways

- State legitimate business justifications to withstand scrutiny under NLRA when restricting use of recording devices
- One party consent is required in WI and state laws vary (38 and D.C. require one party)
- Assess desired policy objectives

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Key Takeaways

- Consider ramifications of recording interviews
- Provide advance notice of surveillance
- Evaluate accuracy of taped events when relying on such events exclusively
- Address expectations of privacy about company-provided devices

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Questions? THANK YOU

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