

SECRET RECORDINGS IN THE WORKPLACE (VICTORIA)

With the ever-increasing popularity of smartphones and other handheld technology, employers need to be aware that a private conversation with an employee may secretly be recorded and used later in evidence against them in legal proceedings. The Fair Work Commission has been reluctant to allow these covert recordings to be admitted as evidence, however, the law on the matter remains uncertain. This guide explains the current legal uncertainty and advises employers how best to manage the risk of an employee secretly recording conversations.

When might the FWC hear an employee's secret recording?

An employee's covert recording may be admitted as evidence if:

- > it was lawfully obtained under relevant state or territory surveillance law; and
- > the evidence has 'probative value' in that it is important to the understanding of a fact in issue; and
- > the evidence goes to a central contested matter in the proceeding and may significantly affect an employee's claim before the Commission.

When is a recording "lawfully obtained"?

In Victoria, the relevant legislation is the Surveillance Devices Act 1999.

- > It is unlawful for an employee to record a private conversation to which they are not a party, where the parties concerned have not consented to the recording,
- > It is lawful for an employee to record a private conversation to which they are a party, but publishing or publicly disclosing this information is generally prohibited.
 - o One exception to this rule applies where an employee is seeking to disclose the recording "no more than reasonably necessary for the "protection of their lawful interests".

Protection of "lawful interests"

Whilst the law is far from settled, there have been cases before the Fair Work Commission and the courts where the employee has attempted to rely on this exception to admit a recording as evidence. Courts and tribunals have generally taken a dim view of employees making secret recordings, with the South Australian Supreme Court in *Thomas v Nash* [2010] SASC 153 going as far as saying that making a recording with the intention to gain a benefit in Civil proceedings would not generally constitute a "lawful interest" protected by legislation. Nevertheless, it is important for employers to remember that the Fair Work Commission is not bound by decisions of other courts and a future case may be decided differently.

In some circumstances, an employee who presents covert recordings of conversations may undermine the implied duty of trust and confidence in their contact of employment. In *Thompson v John Holland* [2012] FWA 10363, the Commission indicated that the secret recordings were "seriously wrong and inexcusable ... [and] a valid reason for dismissal".

What preventative action should employers take?

It is impossible for an employer to prevent an employee from secretly recording a disciplinary or performance management meeting with an employer. However, you can reduce the risk of an employee successfully using the recording in the Commission by:

- > introducing a policy or protocol prohibiting recording in the workplace, advising that such an action may breach the trust and confidence of the employer; and
- > ensuring that proper procedure is followed where there are important discussions with employees. For example, an employer should take comprehensive notes of the meeting and offer the employee the presence of a support person.
- > advising employees that disclosure of the recordings of private conversations may attract criminal sanctions, including a fine or imprisonment.

An employer may reasonably object to the recording of a meeting if requested by an employee. It is important that the employer be clear in their objection to ensure there is no doubt that it impliedly consented to the recording being made.

Contacting the Victorian Chamber of Commerce and Industry

The Victorian Chamber's team of experienced workplace relations advisors can assist members with a range of employment, human resources and industrial relations issues.

Our experienced workplace relations consultants can also provide assistance to both members and non-members on a range of more complex matters for a fee-for-service. The consultants can, among other things, provide training to employees, conduct investigations and provide representation at proceedings at the Fair Work Commission.

For assistance or more information, please contact the Workplace Relations Advice Line on **(03) 8662 5222**.

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