

AUGUST 3, 2026 | AI/TECHNOLOGY, PRIVACY & DATA SECURITY

The Smartphone in Every Pocket: Managing Employee Recordings

BY KARA M. MACIEL

Most employers eventually face a situation involving a secret recording.

A manager learns that an employee recorded a performance counseling session. HR discovers that a witness recorded an investigation interview. A supervisor finds out that a Teams meeting was transcribed and saved without anyone's knowledge. In more contentious situations, employers may discover that employees have been collecting recordings for months in anticipation of litigation.

The initial reaction is often understandable: this employee violated company policy, undermined trust, and recorded workplace conversations without permission.

But before issuing discipline, employers should take a step back. In many cases, the legal risk created by the employer's response to the recording is greater than the risk created by the recording itself.

Employee Recordings Have Become Part of the Modern Workplace

The days when workplace recordings required specialized equipment are long gone. Nearly every employee carries a smartphone capable of making high-quality audio and video recordings. In addition, employees increasingly have access to smartwatches, AI-powered transcription applications, meeting-recording software, and collaboration platforms that automatically generate transcripts and meeting summaries.

Technology has dramatically lowered the barrier to creating and preserving evidence.

As a result, employers should assume that workplace conversations, meetings, and interactions may be recorded, even when no recording is apparent.

Employees record workplace interactions for a variety of reasons. Some employees believe they are protecting themselves from discrimination, harassment, or retaliation. Others may be attempting to document wage-and-hour concerns, workplace safety issues, or management misconduct. In some instances, employees simply misunderstand company policies or the applicable law.

Regardless of the motivation, employers should approach these situations carefully and deliberately.

Not Every Recording Is Illegal

One of the most common misconceptions is that a recording is unlawful simply because management did not consent to it.

State recording laws vary considerably. Some jurisdictions permit recordings when only one participant in the conversation consents to the recording, such as Virginia. Others require the consent of all parties before a conversation may be recorded, such as Maryland.

For that reason, employers should resist the temptation to make immediate assumptions about whether a recording violated the law.

Even if a recording ultimately proves to be unlawful under state law, that does not necessarily mean that discipline can be imposed without creating additional legal exposure. Employers should separately evaluate whether the employee may have engaged in protected activity and whether the proposed disciplinary action could be characterized as retaliatory.

These are distinct questions that often become intertwined in litigation.

Non-Union Employers Cannot Ignore Labor Law Considerations

Many employers are surprised to learn that employee recordings can implicate the National Labor Relations Act ("NLRA"), even in completely non-union workplaces.

Employees who are acting together regarding wages, workplace conditions, scheduling, safety concerns, or other terms and conditions of employment may be engaged in activity protected by Section 7 of the NLRA.

As a result, blanket no-recording policies and disciplinary decisions based on employee recordings may receive scrutiny in certain circumstances.

This does not mean employers are powerless to regulate recordings. Employers have legitimate interests in protecting confidential business information, trade secrets, privileged communications, customer information, and employee privacy.

However, those interests should be balanced against the protections afforded to employees under applicable labor laws.

Employers should carefully evaluate the specific facts before relying on a recording as the sole basis for discipline.

Retaliation Claims Are Often the Bigger Concern

In our experience, the greatest litigation risk often arises not from the recording itself but from the timing of the employer's response.

Consider a few common situations:

- An employee files a harassment complaint and later records conversations with management.
- An employee complains about unpaid overtime and records discussions regarding scheduling or timekeeping practices.
- An employee raises workplace safety concerns and documents subsequent interactions with supervisors.
- An employee reports alleged misconduct and records conversations related to the report.

In each of these situations, the employee may argue that the recording was connected to protected activity.

If discipline follows shortly thereafter, plaintiffs' counsel may attempt to frame the discipline as retaliation rather than enforcement of a neutral workplace rule.

This does not mean discipline is never appropriate. Rather, employers should ensure they can clearly articulate legitimate, non-retaliatory reasons supporting their decision and demonstrate consistent treatment of comparable situations.

Consistency remains one of the most important defenses to retaliation claims.

Workplace Investigations Present Unique Challenges

Recordings frequently arise during internal investigations.

Employers understandably want participants in workplace investigations to speak candidly and cooperate fully. Witnesses may be reluctant to participate if they believe conversations are being recorded and potentially distributed to others.

At the same time, employers should recognize that employees involved in workplace disputes may feel vulnerable and seek to document interactions that they believe could later become important.

When an employer discovers an investigation-related recording, the better approach is generally to gather information before reacting.

Among other considerations, employers should evaluate:

- What was recorded?
- Why was the recording made?
- Does a policy apply?
- Has the policy been enforced consistently?
- Was the employee engaged in protected activity?
- Are there state-law implications?
- Are labor law concerns implicated?

A measured approach can often prevent a difficult situation from becoming a much larger dispute.

AI and Remote Work Have Changed the Recording Landscape

Traditional audio recordings are only part of the modern challenge.

Many organizations now use remote meeting platforms that include recording, transcription, note-taking, and AI-generated summaries. Third-party tools can create transcripts without the knowledge of all participants. Employees can also use external applications that record or summarize meetings independent of the employer's systems.

Yet many employee handbooks and workplace policies were drafted before these technologies became commonplace.

Employers should consider whether existing policies adequately address:

- Meeting recordings.
- AI transcription tools.
- Automated note-taking technology.
- Storage and retention of recordings.
- Sharing recordings internally and externally.
- Confidentiality obligations associated with recorded content.

Policies that fail to account for these technologies may leave employers exposed to unnecessary risk.

A Practical Approach for Employers

When employers discover that an employee has made a workplace recording, an immediate disciplinary response is rarely the best first step.

Instead, employers should evaluate the legal, factual, and practical issues surrounding the recording.

Before taking action, consider the following questions:

1. Was the recording lawful under applicable state law?
2. Was the employee engaged in protected activity?
3. Does the recording involve discrimination, wage-and-hour concerns, workplace safety issues, or whistleblower activity?
4. Does an existing policy clearly apply?
5. Has the policy been enforced consistently?
6. Could discipline reasonably be characterized as retaliation?
7. Has counsel reviewed the situation?

Employers that ask these questions before acting place themselves in a substantially better position than employers that react first and analyze the situation later.

A careful, measured response today may prevent costly litigation tomorrow.