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General Counsel Report

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Are Workplace Recordings Inevitable?

You probably aren't holding press conferences in the office garden. Your boss probably doesn't arrive to work in a helicopter. And, your desk probably isn't a piece of American history. Your workplace probably isn't the White House. But, recent news reminds us that, while the White House has many functions, it is a workplace that must address the same issues that arise in workplaces across the nation. What do the Omarosa-Trump tapes tell us about workplace recordings?

1. In most states, it's not illegal to record a conversation you are a part of.

California, Delaware, Florida, Illinois, Maryland, Massachusetts, Montana, Nevada, New Hampshire, Pennsylvania and Washington prohibit recordings unless all parties have consented in advance of the recordings. Federal and state law in the remainder of the states (and the District of Columbia) throughout the U.S. allow one-party consent. This means that an employee in a one-party state can legally record any conversation that he or she is a part of without notifying or obtaining consent from the other party/parties.

2. Regardless of legality, employers may prohibit recordings in the workplace.

Even if the law allows for one-party consent, employer policy may prohibit workplace recordings. As we discussed earlier this summer, the NLRB recently issued a memorandum in which it reiterated its changed stance on "no-recording" policies. In December 2017, in its ***The Boeing Company*****decision**, the NLRB overruled existing precedent that indicated "a work rule is unlawful if an employee "would reasonably construe" the rule to restrict protected concerted activity…" Under the new test, a work rule is unlawful if it explicitly restricts employees' protected concerted activity. If there is no explicit restriction, the work rule will be deemed lawful if the legitimate business justifications for the rule outweigh the potential impact on employees' rights to engage in protected concerted activity.

In its **memorandum**, the Board clarifies: "Given the substantial legitimate interests behind such rules, and the small risk that the rules would interfere with peripheral NLRA-protected activity, the Board has deemed no-photography rules always lawful. The same analysis applies to no-recording rules, and thus such rules…" are generally lawful to maintain.

What Practical Steps Can You Take to Avoid Workplace Recordings?

1. Develop a clear written policy that addresses workplace recordings.
2. Ensure all employees are aware of the policy and of the expectation of adherence to the policy.
3. Most manager and HR professionals choose words carefully in email, as it's expected that emails can and will serve as evidence (sometimes favorable to the employer's actions, sometimes unfavorable). Bring a similar awareness to meetings and conversations with employees. This is not to suggest that employers should stop having open and honest dialogue with employees about job performance and expectations.
4. Consider training managers and HR professionals on conflict management, effective communication, and performance management. And, consider training all employees on harassment avoidance.
5. Protect confidential and proprietary interests through restrictive covenants. What if a recording is made, regardless of a policy that prohibits them? Depending on the content of the recording, restrictive covenants may allow the employer to prohibit the release of the contents or receive damages if the contents are disclosed.

Please reach out if we can help you take these practical steps.

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Religious Accommodation Refresher

We live in a world where there appears to be a lot of misinformation circulating as to what is, and what is not in the Constitution. Case in point, a recent question I received from a client:

I have an employee who is on a 7 day a week schedule. He told me he cannot be forced to work under the Constitution and he wants to evoke his religious rights and wants every Sunday off going forward. Is this something we have to accommodate even though he was hired for a 7 day a week position?

Religion is a protected class under Title VII, the federal anti-discrimination law. Refusing to accommodate an employee's sincerely held religious beliefs or practices can be a form of discrimination, unless the accommodation would impose an undue hardship on the employer. It is important to note that undue hardship for purposes of religious accommodation is a lower standard undue hardship under the Americans with Disabilities Act (ADA). In fact, undue hardship for purposes of religious accommodation is defined as "more than a minimal burden on the operation of the business."

Here are some important things to note about religious accommodation:

1. The religious belief must be sincere. Here, the employee does not like working on Sundays, but has he indicated that his religion prohibits him from working? Are there facts that indicate this employee's religious beliefs may not be sincere? Does he have other things he likes to do on Sundays that are more likely the reason he does not want to work?
2. Employers do not have an obligation to accommodate a request for religious accommodation if it imposes an undue hardship. The company operates seven days per week. Although this employee holds a position that requires seven days per week scheduling, it is unclear that allowing him to take off Sunday would impose an undue hardship. Could he be allowed to switch shifts with other employees? The EEOC has advised that involuntary shift changes (e.g. requiring another employee to pick up the Sunday shift, when that person doesn't want to) is an undue burden. However, voluntary shift changes, may be a reasonable accommodation.
3. Employers do not have to provide the employee's preferred accommodation if there is more than one effective alternative accommodation to choose from. In other words, you are not obligated to offer the employee the accommodation he wants – Sundays off – unless there is no other effective accommodation available and it does not impose an undue hardship on the company.

Returning to this employee, how sincere do you believe his religious beliefs are? Is he just stating on principal he believes he has a Constitutional right to take Sunday off work — (he doesn't) — or has he stated that Sunday is his Sabbath and his religious practices prevent him from working on Sundays? Has he asked to take off Sundays in the past for other non-religious reasons?
These are all questions that will help determine whether this is an accommodation that you will have to make.

And, of course, a religious accommodation policy as well as a written request form for employees to submit when they request a religious accommodation are both great practices.

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Staying Current With Equal Pay

…***Institutions must advance also to keep pace with the times.***
Thomas Jefferson, the Declaration of Independence

If you, like many, are wondering what the U.S. Department of Labor (the Department) looks at and for when assessing a business for equal pay compliance, you may want to review the **Department's August 24, 2018 publication**. In it, the Department's Office of Federal Contractor Compliance outlines standard procedures for reviewing federal contractor compensation practices during a compliance evaluation. While this publication is geared toward audits of federal contractors, it is also instructive for other employers who want to comply with equal pay laws.

In its publication, the Department informs that as the initial step in an audit, it will look at similarly-situated employees – *"those who would be expected to be paid the same based on: (a) job similarity (e.g., tasks performed, skills required, effort, responsibility, working conditions and complexity); and (b) other objective factors such as minimum qualifications or certifications"*. During that review, the Department will identify "*pay analysis groupings (PAGs) of comparable employees"* statistically controlled *"for further structural differences among members of the PAG (e.g., division, business unit, product line, location) and individual employee characteristics related to the contractor's pay determinations (e.g., company tenure, prior experience, education, grade level)."* If the Department's desk audit provides indicators that require a deeper exploration, the Department will then request additional information sufficient to allow for "*Statistical Methodology and Modeling"* and application of "*Control Variables"* such as sex, race, tenure, education, age, job level or grade and performance ratings.

In the cover page for the distribution of this treatise, the Department stated, "*Equal pay is a critical issue for workers and their families, and a priority of OFCCP's equal employment compliance assistance and compliance evaluation activities."* The Department is sending a clear signal to all employers that it will prioritize a review of an employer's pay structure in every audit.
What is your business doing to ensure compliance with equal pay, and how can we help?

The attorneys at **Foley & Foley, PC** offer a **Turn Key Equal Pay Audit Service** and also an **Affirmative Defense Audit Service**. Both these Audit Services, which are offered for a fixed fee, were designed to ensure that our clients are in compliance with, or will come into compliance with, federal and state equal pay laws. For more information on these services and others, call **508-548-4888**.

Are You Sure You Should Send That Email?

I received an email from a client that contained some less-than-ideal commentary between HR and management. That email trail prompted this article in which we'll discuss situations in which it's critical to document and when it may be best not to document.

When to Document

- The ADA interactive process or requests for accommodations under state-specific laws;
- Requests/approval/denial of leave, whether mandated by law or provided for by company policy;
- Performance concerns, especially pursuant to a progressive discipline policy;
- Allegations of discrimination, harassment, or other unlawful behavior; and
- Workplace investigations, ideally at the direction of counsel.

When not to Document

1. When emotions are high

We are all familiar with this rule as it applies both in and out of the workplace. You compose a text or an email in anger, frustration, or defense. Don't send that email! If you must, write it out, ceremoniously click "delete," and breathe a sigh of relief. Or, write it and save it for later review. Maybe you'll still want to send it 24 hours later. Likely, you won't.

I provide training to management on effective communication. During the session, one thing I often recommend is to vent wisely and appropriately. This can allow you to move beyond the emotions so that you're able to have that effective conversation. Find a trusted resource, someone who can listen, offer advice, and help to settle your emotions. Don't vent to that coworker worker who will get you more fired up. And, don't vent in writing! Even if you ultimately take favorable action, a "venting" email can be very damaging evidence in a complaint against your organization.

2. When questioning management/HR's adherence to a law, policy, or procedure

This should not be confused with the points above advocating documentation of allegations or investigations. Here, I'm referring to the situation in which HR writes to the manager: "Was Bob's request for an accommodation denied?" or "Was Sally hired before the other candidates were interviewed?" or other similar questions that invite a possibly problematic response. Instead of emailing these questions, have a meeting to discuss them. The meeting and action items can be appropriately documented after the fact.

3. When admitting or acknowledging variance from the law, policy, or procedure.

In item #2, we want to avoid the email that's setting up the problematic response. Here, we're avoiding the problematic response itself. If you receive a text/email like the one above, responding in writing is perfect if you are comfortable that the actions taken were wholly in compliance with the law, policy, and procedure ("No, Bob and I discussed and we are able to

accommodate his requests. We agreed to check in regularly. I have documented our conversation and provided a note to Bob that summarizes our discussion and agreement."). If you're not comfortable that this is the case, have a meeting to discuss. Again, the meeting and action items can be appropriately documented after the fact.

Solid documentation can be extremely beneficial. A lack of documentation can be problematic. Documentation that demonstrates a failure to comply with the law, policies, and procedures **will be costly.** Train HR and management on what/when/how to document effectively and when not to document. We can help.

ADA Interactive Dialogue: Interaction and Documentation Required

On August 29th, the EEOC helped prove the point by **suing Charter Communications** for alleged violations of the ADA. "According to the EEOC's lawsuit, an employee who could not drive at night due to cataracts and night blindness, and who worked a shift ending at 9:00 p.m., asked to be moved to an earlier shift. Charter granted the request, but only for about a month. The employee requested an extension, but Charter refused to grant it. After the accommodation expired, Charter, **without consulting with the employee about needing further accommodation**, moved him back to the shift ending at 9:00 p.m."

We don't have the facts available to us, but I'm willing to guess that one of two things happened here: 1) The company failed to engage in the interactive process with the employee; or 2) The company engaged in the interactive process with the employee but failed to document its efforts. Although #2 is not a violation of the law, it's obviously problematic nonetheless. Maybe the company did all the right things – talked to the employee, assessed the requests, tried different options, considered the hardship, provided feedback to the employee and asked for his or her feedback. Maybe the company did all these things and "just" failed to document them. Clearly, a failure to document can be costly. Or, maybe the facts will reveal that #1 occurred – the company had no documentation because there was no process to document.

EEOC guidance has long indicated that when an employee requests an accommodation, the employer should not focus its time and efforts on an inquiry into whether the disability meets the definition, but whether the requested accommodations can be provided. Some employers bristle a bit when they hear this guidance as it can sound as if the EEOC is suggesting that any and all are entitled to accommodations under the ADA. While I understand that reaction, I would suggest a different view. I suggest that employers consider this guidance as empowering. Some employers may avoid the interactive process because they're uncomfortable or scared. They're scared to ask the "wrong" question or say the "wrong" thing about an employee's disability. By following the EEOC's guidance, employers are able to move the focus to what they're comfortable with, what they know, understand, and have the ability to impact and influence: the business, the operations, the job. Instead of talking about the employee's diagnosis, the conversation is about what the employee needs to do his job, what the company needs from the employee, and how the parties can work together to meet the needs of both.

So, the next time an employee requests an accommodation, don't be afraid to **talk** to him or her. And, when you do, document, document, document.

General Counsel Office Hours

Mike Foley has been representing employers, small and large, for-profit and not-for-profit within all industry sectors and in all matters of labor and employment law for over 30 years. He draws on the breadth of his experience to offer employers an uncommon approach and practical solutions. Click here for Attorney Michael E. Foley's bio.

As General Counsel, Mike will be available within his virtual and gratis office hours for all SCHRC members in good standing from 2 pm to 3 pm on the first and third Tuesday of each month. The guidance Mike provides during his office hours will cover all issues that arise within the broad spectrum of the employment relationship to help SCHRC members achieve compliance with the extensive regulations that govern their workplace and to better understand best employment practices.

Issues related to the Internal Revenue Code/the Internal Revenue Service or ERISA-related issues will not be covered under this arrangement, nor will the interpretation, editing or drafting of documents. The office hours will be limited to providing guidance on employment law questions and corresponding HR-related risk management that can be answered in one telephone conversation. Mike can be reached during his SCHRC General Counsel Office Hours at 508-548-4888.