

Can you secretly tape employee meetings?



What a person said during a termination meeting can win or lose an unfair dismissal case.

Therefore some employers (and employees) are deciding to secretly record workplace meetings, to prove exactly what was said, and the tone of discussions.

Smart phones, tablets, pocket sized devices - modern technology is changing the way this evidence can be obtained.

But can employers legally record a meeting without the employee knowing?

Do the same rules apply to employees who want to secretly record a meeting?

Secret recordings

In Queensland, it is legal for a face to face conversation to be secretly recorded by a person who is a party to the conversation.

This means the employer may secretly record a meeting with an employee without committing an offence, as can the employee.

However, the danger with secretly recording a meeting is that it is arguably a breach of the employee's trust and confidence.

An employee might therefore claim that as a result of the secret recording the employment relationship broke down, giving them no choice but to resign. It is possible that the employee could succeed in an unfair dismissal claim on this basis.

You should therefore refrain from making a secret recording of a meeting other, than a termination meeting, and even then you should exercise caution. A better option is to seek the employee's consent to the recording. Although you should bear in mind that telling an employee you are taping a conversation can put them on their guard meaning they may be less likely to speak candidly about past events or admit a need to improve performance.

By the same token, if an employee secretly records a meeting, an employer might claim that is a breach of trust and therefore grounds for dismissal. This issue is yet to be fully explored by the Fair Work Commission, so you should take advice before dismissing an employee for this reason.

How can these recordings be used?

Not all secret recordings will be allowed as evidence in a Fair Work Commission hearing.

A secret recording is more likely to be admitted as evidence if:

- The employee does not object to you submitting it for the Commission's review. This is unlikely where the employee thinks that this will hurt their case;
- The recording was made lawfully; and
- The recording is truly relevant to the case. For example, the recording does more than serve to embarrass one of the parties.

However, even if a recording will be inadmissible as evidence in a hearing, the fact that you have one may deter an employee from making a claim or continuing with a claim.

How to protect yourself against secret recordings

Policy

Just because secret recordings by employees are lawful, does not mean you have to tolerate them in the workplace. One way you may prevent secret recordings is by introducing a policy against them. Such a policy should be carefully drafted to ensure you have discretion

to allow secret recordings in certain circumstances. For example, where verbal bullying is secretly recorded, you won't want to cover it up or be seen to support the bully, so your policy might allow for recording in such cases.

A policy against secret recordings might support a case for dismissing an employee where such a recording is discovered. Practically, however, it could be difficult for you to enforce a ban on secret workplace recordings.

Using a Script or Letters

Another way to avoid being caught out by a secret recording is to engage a lawyer to draft a script for you to follow in a performance or termination meeting. Where appropriate you could otherwise carry out the performance management or dismissal process through a series of letters, reviewed by a lawyer, to avoid meetings altogether.

Objections to disclosed recordings

You may openly seek to record a meeting, by asking for the other parties consent to this. However there are many issues to consider where either party refuses to consent to a recording.

For more information about how to lawfully record termination meetings, for assistance with preparing scripts for termination meetings, or advice about workplace policies involving this, you should contact...

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