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EMPLOYMENT LAW ALERT

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When A Whistleblower Goes Too Far

by Melanie Hines, Esq.

Scenario

An employee believes she's been asked by her manager to back-date some important company documents, so she secretly tapes their next conversation they have about the matter. She reports the event to corporate security and produces the tape recording. She is a whistle-blower entitled to protection from discipline, but has she gone too far? Has she violated Florida law by secretly taping the conversation? How can the company protect itself from liability for the actions of the employee and the manager?

Was the taping illegal?

Florida law prohibits surreptitious tape recordings, unless conducted by law enforcement pursuant to a warrant or at their direction (Ch. 934, Fla. Stat.). The law covers oral communication uttered by a person exhibiting an expectation of privacy under circumstances justifying such expectation. A person or entity that violates this law by recording, disseminating, or using the content of the tape is subject to felony prosecution,

treble and punitive damages, fines, attorneys fees and costs.

The courts have held that there is a right of privacy in a party's office or place of business, but it is not absolute. Private conversations in a private office may be protected, but it depends on the facts. The courts will review how many people were present, who asked for the meeting, where it was held, and the nature of the discussion. The following are not protected from secret tape-recording: public meetings; business conference calls; extortionate threats; obscene and threatening telephone calls to a business. All other conversations are generally held to fall within the protection of the statute and secretly taping them is illegal.

Is the employer liable?

If the circumstances support a conclusion that the communication was intended to be private, then the employee violated the law and is liable for the taping and for attempting to give the tape to the company. Under Florida law, an employer can be liable both civilly

and criminally for the acts of its employees committed in the course of its business activity, and this rule has been applied to violations of Chapter 934.

However, the Company may be able to rely on the good faith defense supplied in the statute if it acts prudently with respect to the tape and its contents. The company can mitigate its risk by not accepting the tape, by not asking the employee to describe what is on the tape, and by not using the content of the tape in any subsequent investigation of the manager.

What can the employer do about the manager's alleged misconduct?

The employer can ask the whistleblower about any statements or actions of the manager that preceded and/or followed the taping, and can audit the work of the manager to determine if the allegations are accurate. If the manager is ultimately charged with criminal activity and /or discharged, the employer will be called upon to prove that the investigation did

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not derive from the illegal taping itself, so it is wise to ask the whistleblower to sign an affidavit indicating that she did not reveal the contents of the tape to the company.

What can the employer do to prevent illegal tape-recording?

Make sure employees are aware that the Company does not allow surreptitious tape recordings of conversations. This prohibition can also protect the company's private information. The courts have allowed employers to sue an employee for Chapter 934 violations that result in theft of trade secrets.

Conclusion

The prudent employer will specifically prohibit surreptitious tape recording in the workplace. If notified that it has occurred, the prudent employer will not accept, disseminate, or use the tape or its contents and will advise the employee not to further disseminate or use the tape. The employer may also owe a duty to notify law enforcement about the illegal activity. ■

Labor & Employment Law Group

The Labor and Employment lawyers at Berger Singerman assist clients in getting through the complex maze of labor and employment rules and regulations that govern today's workplace. Our team is diverse and experienced, and includes the former Secretary of the Department of Labor for the State of Florida, and two former law clerks to justices of the Florida Supreme Court. Lawyers have been recognized by their peers through inclusion in Best Lawyers of America, Florida Trend Legal Elite, South Florida Legal Guide, and Super Lawyers, for their expertise in employment law. We handle all aspects of labor and employment law, from routine workplace compliance issues through complex jury trials.

Labor and employment lawyers at Berger Singerman often review existing policies and procedures to ensure compliance with applicable laws and regulations. We regularly review and prepare policies, procedures and documentation concerning hiring, job classifications, wage and hour, telephone and computer monitoring, Discrimination and harassment, maintaining and protecting trade secrets, confidentiality obligations, conflicts of interest, privacy rights, FMLA, ADA, workers' compensation, codes of conduct, and employment agreements.

We routinely advise clients on how to avoid or minimize liability that may arise from potential claims by employees who are about to be terminated, as well as claims made by former employees.

Our lawyers excel in resolving disputes in a variety of settings, including mediation, arbitration and court. Our Labor & Employment lawyers have been successful in defeating class action certification for alleged improper classification of approximately 5,000 employees as independent contractors; representing a successful whistle-blower in an \$82 million claim; prevailing in a number of race, sex and national origin discrimination claims; defending one of the largest Fair Labor Standards Act class action claims in the Southern District of Florida; and enforcing restrictive covenants throughout the State of Florida and the country

For further information regarding whistle-blowers and suspected illegal activity in the workplace, please contact us.

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