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Can Whistleblowers Disclose Secret Recordings to the SEC?

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Many companies ban employees from making audio or video recordings in the workplace. Companies argue that these policies promote employee communication without the fear of being recorded. However, are these policies lawful? Can corporate whistleblowers provide recordings evidencing fraud to the SEC notwithstanding these policies?

Taping and Disclosing Information to the SEC Can be Protected Activity

Rule 21F-17, one of the regulations implementing the Dodd-Frank SEC whistleblower-reward program, prohibits companies from having policies or provisions in agreements that prevent whistleblowers from providing information to the SEC: "No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications." The SEC has used this rule to eliminate obstacles that whistleblowers face when reporting violations to the SEC, such as:

- Requiring employees in certain internal investigations to sign confidentiality statements with language warning that they could face disciplinary action, including termination of employment, if they discussed the subject of the interview with outside parties without the company's legal department's prior approval or requiring; or
- Requiring former employees to waive the right to recover a whistleblower award and agree to notify the company's legal counsel before disclosing information to government agencies pursuant to legal process.

Rule 21F-17 arguably trumps any company policies that prohibit employees from making recordings of non-privileged information to disclose securities law violations to the SEC.

Workplace recordings can also be protected under the Sarbanes-Oxley Act (SOX) and other whistleblower protection laws. For example, in *Franchini v. Argonne National Laboratory*, the Department of Labor Administrative Review Board (ARB) held that recording workplace conversations to gather evidence of safety violations is protected whistleblowing under the whistleblower protection provision of the ERA. In *Franchini*, the whistleblower recorded conversations evidencing potential radiation contamination and workplace safety issues. In the course of raising his concerns internally and to the Department of Energy, the whistleblower made

about 50 recordings of discussions with his supervisors and co-workers. The ARB held that gathering evidence by recording workplace conversations can be protected whistleblowing under the ERA. Notably, the ARB distinguished the whistleblower's recordings from other unprotected recordings, such as when a whistleblower engages in indiscriminate and excessive recording of unrelated topics, i.e., a company's business strategy and finances.

Moreover, policies banning recordings might violate the National Labor Retaliations Act (NLRA). Indeed, the Second Circuit recently held in *Whole Foods Mkt. Grp., Inc. v. N.L.R.B.* that the company's policy barring employees from workplace recordings violated Section 7 of the NLRA, which guarantees the right to "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection" and bars employers from interfere with, restraining, or coerce employees in the exercise of those rights.

Whole Foods' policy prohibited employees from "record[ing] conversations with a tape recorder or other recording device (including a cell phone or any electronic device) unless prior approval is received from your store or facility leadership." The NLRB found that this policy was an unfair labor practice in that it could restrict concerted activities, such as "employees recording images of employee picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, or documenting inconsistent application of employer rules" without management approval. The Second Circuit affirmed the Board's holding that the policies' overbroad language could "chill" an employee's exercise of Section 7 rights.

No Law Provides Blanket Authorization to Record Workplace Conversations

Though using workplace audio or video recordings to blow the whistle can be protected under some whistleblower protection laws, there are several countervailing issues that whistleblowers and their counsel should consider before using a recording to advance a whistleblower retaliation or whistleblower rewards claim.

First, the SEC will not use privileged information (e.g., a recording of a lawyer providing advice), and the SEC seeks to avoid receiving any privileged information because of the risk that it could taint an investigation. To the extent a whistleblower has a recording containing privileged information, the whistleblower and counsel should proceed very carefully and should consult state attorney ethics rules.

Second, an employee could face civil or criminal liability for making a surreptitious recording in a state in which two-party consent is required. The Reporters Committee for Freedom of the Press has issued a helpful state-by-state guide to taping phone calls and in-person conversations, which is available here.

Third, in retaliation claims, a recording that violates company policy could potentially give rise to an after-acquired evidence defense. After-acquired evidence is evidence of wrongdoing that an employer discovers after an adverse employment action that would justify the employer taking the adverse action at the time that the employer discovers the evidence. For example, if an employer fires a whistleblower in violation of the Sarbanes-Oxley whistleblower law and subsequently discovers that the whistleblower embezzled money from the company, the company could likely prove an after-acquired evidence defense at the time it discovers the theft, thereby limiting the whistleblower's remedies.

The after-acquired evidence is often misused by employers to justify a witch hunt aimed at digging up dirt on the whistleblower *after* the employer already took the adverse employment action. Fortunately, there is a high bar to proving an after-acquired evidence defense. In *Clemmons v. Ameristar Airways, Inc.*, the ARB ruled that an employer asserting an after-acquired evidence defense must prove the defense by *clear and convincing* evidence. An employer will only meet this burden if the evidence immediately tilts the evidentiary scales in the employer's direction. In other words, an employer must show that the wrongdoing was so significant that it would have fired the employee for that action alone.

The issue of whistleblowers using company documents to prosecute their claims is complex. A recent decision providing a comprehensive analysis of these issues is Erhart v. Bofi Holdings, which is summarized here.

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