LABOR ARBITRATION CONFERENCE

The Use of Recordings, Such as Those Made by Cell Phones, as Evidence in Arbitrations

November 3, 2017

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Tape Recordings in the Work Place and Arbitration

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Tape Recording Conversations

- Tape recorded conversations arise in arbitrations in the following contexts.
  - Secret tape recordings in the workplace (resulting in discipline).
  - Disclosed tape recordings in the workplace (Employer prohibiting such recordings + refusal = insubordination).
  - Agreed upon recordings of meetings (under what circumstances).
Tape Recorded Conversations

• Tape recorded conversation also arise in the employer/employee relationship in the following contexts that relate to arbitrations:
  
  o Protected concerted activity / unfair labor practices
  o Violations of state and federal anti-wire tapping statutes
  o Evidentiary issues at arbitration
Secret Tape Recordings

• Arbitral law generally prohibits secret tape recordings and in certain instances is found to be a fireable offense.

  • *Davidson Transit Organizations & ATU Local 1235, No. 09-2 ARB. P. 4703 (Jun. 8, 2005)*: long standing arbitral law prohibits secret tape recording as disruptive in industrial settings. It doesn’t matter if the act of recording is legal under state law (citing cases).

  • *2013 AAA LEXIS 180 (Apr. 8, 2013)*: even though the employer policy manual prohibited recording and it’s illegal under state law, employee had language issues and wasn’t on notice of the policy – so illegal recording was not fireable offense.

  • *2004 AAA LEXIS 838 (Dec. 21, 2004)*: contrary to the case immediately above, secret taping that’s against company policy and illegal justifies termination. Employees should know the rules. Taping is also against common sense. See also *2004 AAA LEXIS 272 (Apr. 10, 2004)* (employee fired for secret recording based on insubordination and illegality under state law).
Disclosed Tape Recordings in the Workplace

- Disclosed tape recording might be permissible, but it may be insubordination to refuse to turn off a recording if management orders an employee to turn it off, and it can be considered threatening behavior subject to discipline even if not specifically prohibited by rule.
  - *Big Rivers Electric Corp. & International Bhd of Elec Workers*, No. 15-2 ARB p.6536 (Oct. 23, 2015): Recording over a supervisor’s order is insubordination, but the employee must be charged with the offense of recording for it to form the basis of termination.
  - 2005 AAA LEXIS 1086 (Nov. 21, 2005): taping black employees with their knowledge violates anti-discrimination policy, even though the anti-discrimination policy doesn’t specifically prohibit taping.
  - *United Food and Commercial Workers Union*, No. 94-1 ARB p.4070 (Aug. 9, 1993): employee faked recording conversations with co-workers; warned previously about recording; fake recording is sufficient to justify termination.
Agreed Upon Recordings of Meetings

• Both sides can agree to tape recording, but the procedures should be fair and both sides should have access to the recording
  o *Enterprise Elementary Teachers & Enterprise Elementary District*, No. 05-2 ARB p.3260 (Jul. 8, 2005): employer provided notice that it wished to tape investigation meeting, but said it would not provide a copy to the employee. Arbitrator says that amounts to discrimination against the employee for engaging in union activities and ordered related materials removed from the employee’s personnel file.
  o *United Steelworker and Tri-County Electric*, No. 00-1 ARB p.3374 (Jan. 18, 2000): case notes in passing that both sides agreed to tape recording grievance meeting, provided that Management receives a copy of the tape. See also *U.S. Pipe & Foundry Company and Allied Workers*, No. 96-1 ARB p.6110 (July 17, 1995) (union and management tape record meeting).
Protected Concerted Activity

• Board law provides:
  • Blanket policies prohibiting recordings are unfair labor practices when they infringe on recording for protected concerted activity
    o *Whole Foods Market*, 2015 NLRB LEXIS 949 (Board decision – cease and desist order) (seminal decision that prohibits broad policies against recording as infringing on protected concerted activity)
    o *Caesar’s Entertainment*, 2015 NLRB LEXIS 663 (2015) (board decision) (policy banning all recording is overbroad because it interferes with protected concerted activity)
    o *Quicken Loans*, 2016 NLRB LEXIS 228 (2016) (ALJ decision, adopted at 2016 NLRB LEXIS 754) (broad policy against recording violates the Act because the employer did not limit it to legitimate business reasons)
    o *Midwest Terminals*, 2016 NLRB LEXIS 694 (2016) (ALJ decision, no subsequent history) (broad policy that prohibits all types of recording is overbroad)
Protected Concerted Activity (cont.)

- But a narrower policy against recording is legal if it carves out protected concerted activity or exists for legitimate reasons that are “weighty”, such as patient confidentiality at a hospital
  - **Flagstaff Medical Center**, 357 NLRB 659 (2011) (board decision) (policy that says "[t]he use of cameras for recording images of patients and/or hospital equipment, property, or facilities is prohibited" does not violate the Act because privacy interests of patients are “weighty”)
  - **Interbake Foods**, 2013 NLRB LEXIS 583 (2013) (ALJ decision, adopted by 2013 NLRB LEXIS 674) (when employee records for reason that is not protected concerted activity, employer can use recording as basis for discipline)
Protected Concerted Activity (cont.)

• Employers do not have to allow recording that is illegal under state law, although Board law is not entirely clear on this point
  o *Cellco Partnership*, 2014 NLRB LEXIS 585 (2014) (ALJ decision, no subsequent history) (Prohibiting recording without consent for legitimate reasons, such as compliance with state law, is permissible because it’s not clearly directed at preventing protected concerted activity).
  o *Verizon Wireless*, 2017 NLRB LEXIS 281 (2017) (ALJ decision, no subsequent history) (broad provision against recording not limited to states where it’s illegal to record without consent, policy violates the Act as overbroad)
  o *Stephen Media LLC*, 356 NRLB 661 (2011) (board decision) (no employer policy prohibited recording, upholding right to secretly record interrogation as protected concerted activity, at least where employer makes no showing that recording is illegal under state law) (decision upheld by D.C. Circuit, as noted below)
Potential Policy Language

A prohibition accompanied by the following:

• Employees are allowed to use camera or video recorders for purposes protected by law, for example, to engage in “protected concerted activities” such as recording images of protected picketing; documenting unsafe workplace equipment or hazardous working conditions; and documenting and publicizing discussions about terms and conditions of employment.
Anti-wire Tapping Statute

• 18 U.S.C. 2510
  o Any person who –
    (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

    ....
    Shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).
  o Exemption for single party consent.
Anti-wire Taping Statutes

- Rhode Island General Laws §11-35-21
  - Anyone who:
    1. Who willfully intercepts, attempts to intercept, or procures any other person to intercept or attempt to intercept, any wire or oral communication; or
    ...
    3. ... Shall be imprisoned for not more than five (5) years.
  - Exception for single party consent.
  - Note: Massachusetts law ➔ two party consent.
Evidentiary Issues

• While arbitrators are not bound by the rules of evidence, some arbitrators will use them as guidelines.

• Two key concepts:
  o Hearsay
    • Admission of a party opponent
    • Otherwise hearsay
  o Fruit of the poisonous tree
    • Illegally recorded