

Can I Record A Meeting With My Boss? Do I Have To Tell Her That I Am Recording Her?

As employment lawyers, we are often asked whether it is legal to record a conversation at work, specifically the ones related to concerns over workplace performance or where there is a dispute in the workplace and the employee wants to have an exact record of what was actually said. The second question we are then asked is whether you can make the recording without the other person knowing. The simple answer to the question of making a recording of a workplace conversation is "Yes", **but only if** the following apply:

1. you are a participant in the conversation and consent to the conversation being recorded;
2. you are an employee, not acting as a member of management; and
3. you were intended to receive the communication.

Pausing for a moment to understand that the basic law in Canada, it is important to know that it is illegal in Canada to wilfully intercept a private communication (section 183 of the Criminal Code of Canada). "Intercept" means: listen to; record; acquire or acquire the substance, meaning or purport of the communication. In plain words, you are not permitted to surreptitiously listen to someone else's conversation, let alone record it. In fact, it is illegal in Canada to possess surreptitious recording devices.

The reason you can record your own conversations is the "one party consent" exception, meaning, where one of the parties to a conversation consents to being recorded, then they can record the conversation. In multi-party workplace conversations it only takes one party to consent to being recorded to fit within the exception.

It is also important to distinguish between your workplace conversation and police wire taps. The police are not permitted to listen in on your conversations or "bug" your meeting room to gather information relating to a potential crime unless they have a warrant allowing such activity or other very limited exceptions apply. The rules applicable to the police are far more stringent than those related to you in your workplace scenario because the police are agents of the state and the state may be looking to send you to jail if you are convicted of a serious crime.

Back to the question at hand, if I am in a meeting with my boss during which we are going to discuss my work performance, can I use my phone to record the conversation? Assuming you consent to being recorded and it is your performance that is being discussed, then, yes, you can use your phone to record the conversation.

In answer to the second question, "No, you do not have to tell the other party that you are making a recording of your conversation with them", which is the one party consent rule referred to above.

Now, before you start recording your conversations at work, you should first ask yourself the following questions:

1. What you are going to do with the recording?
2. How are the other people going to react to having been recorded?
3. Is it going to help or hurt the work situation if you record the meeting without the others knowing?
4. Do the others want to record the meeting as well?

While a recording of a conversation lets everyone know exactly what was said, it may also result in strained workplace relations. Issues of trust, honesty and their counterpoints, mistrust and the feeling of having been deceived can easily be tested by making a surreptitious recording of your conversations at work.

Further, if you are a manager, acting as the representative of the company, the answer to whether you can record your workplace conversations with your subordinates changes, as privacy legislation impacts how employers collect, use and disclose the personal information of their employees.

Depending on your province of employment, and depending on whether your employer is a provincially or federally regulated employer, a provincial privacy act or the federal *Personal Information Protection and Electronic Documents Act* addresses the collection, use and disclosure of personal employee information.

For example, while it may seem that a recorded conversation with an employee about their workplace performance fits nicely within the exceptions under section 15 of the Alberta *Personal Information Protection Act*, when employers collect, use and disclose employee personal information (which includes recorded conversations with them) the employer must first inform the employee of what information is collected and how it is going to be used or disclosed. Therefore, if conversations with employees may be recorded as part of the performance management program or as part of an investigation process, then the employer must advise the employees that they may record conversations with them, what those recordings will be used for and identify who the employee can speak to about the recordings. Furthermore, the reasons for gathering that information in that way must be reasonable.

Therefore, if the employer wants to be able to record conversations with employees related to their work and use those recordings to manage the employment relationship, then the employer must inform the employees that it is doing so. However, recording all conversations with employees may not be reasonable regardless of the fact that the employer has a policy stating that it may record any conversation with an employee at any time. An employee may file a complaint with the privacy commissioner relating to the collection of employee personal information (this can include video surveillance and recorded conversations) or an employee may try to have the recording deemed inadmissible as evidence in a grievance or other proceeding relating to the employee's work performance that may make it difficult to enforce discipline or sustain a termination for just cause if the collection of the information is found to be improper or deemed inadmissible.

Finally, the common-law tort of "intrusion upon seclusion" has been recognized in Canada by the Ontario Court of Appeal in *Jones v Tsige*¹ ("*Tsige*") where the Court outlined the elements of the tort as follows:

1. an unauthorized intrusion;
2. that the intrusion was highly offensive to the reasonable person;
3. the matter intruded upon was private; and
4. the intrusion caused anguish and suffering.²

The first element focuses solely on the act of intrusion, as opposed to the dissemination or publication of information. The focus is on the "type of interest involved and not the place where the invasion occurs"³. The factors to be considered under the second element include the degree of intrusion, the context, conduct and circumstances of intrusion, the tortfeasor's (i.e. the person committing the intrusion) motives and objectives and the expectation of those whose privacy is invaded. Under the third element, the plaintiff (person whose privacy was breached and commenced the lawsuit) must establish that the expectation of

seclusion or solitude was objectively reasonable. The fourth element is generally presumed once the first three elements have been established.⁴

The *Tsige* case was a claim by the person whose privacy was invaded, against the person who wrongfully accessed that information at work, not against the employer whose records were accessed. The extent to which the tort of intrusion upon seclusion will gain a foothold in the employment law context has yet to be seen, however in the arbitration case of *Alberta v Alberta Union of Provincial Employees*, 2012 CanLII 47215 (AB GAA), Arbitrator Sims awarded each grievor damages of \$1,250 as a result of their employer's wrongful invasion of a group of employees' privacy rights, based, in part, on his consideration of the damages principles and award set out in the *Tsige* case. Arbitrator Sims did not make any further orders relating to the rectification of the breach as that had already been addressed in a complaint to the Privacy Commissioner. In contrast, in British Columbia, the courts have held that there is no common law cause of action for breach of privacy. Elsewhere in Canada, the law remains unsettled on the issue.

So, while you may be within your rights to record a workplace conversation with your boss without her knowing you are making the recording, you will want to carefully consider how you intend to use that recording and whether, in making use of the recording, are you venturing into an area in which your boss may have an action against you (and potentially a claim for damages) for intrusion upon seclusion.

¹*Jones v Tsige* 2012 ONCA 32.

²*Tsige* at para 56.

³*Tsige* at para 57.

⁴*Tsige* at para 57-60.

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