

HOW TO...

deal with an employee who makes, or requests to make, a recording of a meeting



For the record

Employers should be clear under what circumstances employees can make a recording of a work meeting. James Green gives guidance on possible scenarios.

policy will be grounds for disciplinary action. It would also be good practice for the employer to set out the reasons for implementing the policy so that line managers can point to those reasons if they are challenged.

There may be alternatives to recording a meeting. For example, the employer could offer the employee a copy of its notes from the meeting. If the employee is accompanied at the

meeting, his or her companion could make notes.

If the employer's policy is that recordings are not permitted, the person chairing the meeting should remind the employee of this at the beginning of the meeting.

The chairperson should also make it clear that recording the meeting in breach of the policy would be grounds for disciplinary action.

An employer is not permitted to search an employee to check whether or not he or she has a recording device. However, if the employee refuses to confirm that he or she is not recording the meeting – or confirms that he or she is recording the meeting – it may be appropriate for the employer to adjourn the meeting to decide how it should be conducted.

Permitting a request from an employee to record a meeting

Most employers are unlikely to take an organisation-wide stance that all requests to record meetings will be permitted.

However, an employer may decide to permit recordings on a case-by-case basis, provided that the person chairing the meeting and other participants agree to the request.

Employers should consider requiring written notice in advance of a request to record a meeting.

If an employer agrees to allow an employee to record a meeting, it should establish some ground rules in relation to how the employee can make, store and use the recording. The employer should make it clear that the employee is entirely responsible for making the recording and that the meeting will not be delayed or adjourned if there are technical difficulties.

The employer should require the employee to provide it with a copy of the recording.

It would also be prudent for the employer to ask the employee to confirm in writing that he or she will not broadcast the recording, post it on the internet, or use it for any purpose other than keeping a record of the meeting for his or her own personal use.

Recordings made by the employer

If an employer receives a request from an employee to record a meeting, it could decide to record the meeting itself and provide a copy of the recording to the employee, to maintain control over the process.

This may also reduce the chance of the employee recording the meeting covertly. The agreement of the employee will be required for the employer to make its own recording.

This approach may not be practicable for all meetings because of the additional administration involved, but for matters that are likely to be particularly contentious or difficult, it may be something for employers to consider.

When making a recording, the employer should test the equipment and obtain technical assistance if required to ensure that an accurate record is made and all participants in the meeting can be heard. The employer should also contemplate arranging for notes to be taken, in case of technical difficulties. The employer should also consider whether or not to provide the employee with a copy of the recording (if it does, this needs to be in a format that the employee can use) or a transcript. Making transcripts of recordings can be a time-consuming task and a long meeting often takes many hours to transcribe.

Reasonable adjustments

If an employee has a medical condition that makes it difficult for him or her to take a written record of the meeting or to recall the detail of what was said, it may be advisable for the employer to permit the employee to make a recording of the meeting. This may be a matter of procedural fairness. Where the employee is disabled, it may also be required as a reasonable adjustment under the Equality Act 2010.

Where an employer imposes a practice or policy that places a disabled employee at a substantial disadvantage when compared with a non-disabled employee (in this case not allowing meetings to be recorded), the employer is under an obligation to take reasonable steps to help alleviate that disadvantage. Where an employer is aware that an employee has a medical condition that may impact on his or her ability to take notes or recall the detail of a meeting, the employer should discuss potential adjustments with the employee.

It may be that other steps can be put in place to help the employee, such as offering the support of a note taker or allowing additional time for note taking during the meeting.

However, if a refusal to allow recordings of meetings to be made would place the employee at a substantial disadvantage, the employer may have to suspend the policy for that employee. It would be permissible for it to insist that the organisation take responsibility for making the recording, rather than the employee, if that was its preference.

Covert recordings

An employee may decide to make a covert recording of a meeting instead of seeking permission to make a recording, or after such a request has been turned down.

The prevalence of smartphones and other portable recording devices means that this has become easier for employees to do. Circumstances in which employees may decide to make covert recordings of meetings include:

- to gather evidence of bullying or harassment;
- to gather evidence for a claim against the employer, such as evidence of a predetermined decision to dismiss made outside the context of a disciplinary hearing; and
- where the employee is the subject of allegations, to obtain evidence to defend him- or herself by providing an accurate record of how a particular meeting or interaction was undertaken.

Where a covert recording produces evidence of serious wrongdoing, eg harassment or bullying, the employer will need to consider the contents of the recording and address the issue that it uncovers, even where the evidence was obtained in breach of its policy or without permission.

The employer should recognise that such evidence would be difficult to establish through written documentation or public interaction witnessed by others, and that the employee may have felt that a covert recording was his or her only option.

The potential for covert recordings should be a reminder to employers to ensure that managers follow good practice in every meeting, in particular avoiding "letting off steam" or making inappropriate comments if the employee leaves the meeting for an adjournment.

Disciplinary action

An employer may want to take disciplinary action against an employee who has made a covert recording.

The employer must establish the facts of the case, following a proper investigation, and decide whether or not it is appropriate to commence the disciplinary procedure.

The employer should consider, for example, the employee's reason for making the recording, whether or not he or she had been told that recording was not permitted and any mitigating circumstances.

An employer will be in a stronger position to take disciplinary action, potentially including dismissal, if there is a clear policy that prohibits recordings and indicates that dismissal is a possible disciplinary sanction.

Employers should be aware that taking disciplinary action because an employee has made a covert recording could amount to victimisation under the Equality Act 2010, if the employee made the recording to provide evidence of unlawful discrimination.

THE AUTHOR

- James Green is a senior associate in the employment team at Burges Salmon LLP.

This is an edited version of an article on XpertHR, which also looks at the admissibility of covert recordings in employment tribunal proceedings.

www.xperthr.co.uk/how-to-deal-with-an-employee/157358