

Recording Conversations in the Workplace – Resource Guide

APPLICATION:

This Resource Guide applies to all Executive Branch state employees, including those not covered by the Virginia Personnel Act. This guidance is only intended to apply to such employees and workplaces located in the Commonwealth of Virginia.

BACKGROUND:

Questions can arise regarding whether it is appropriate for employees to record conversations, secretly or otherwise, in the workplace among co-workers and/or between a supervisor and subordinate. With current technology, it is easy for a phone or other electronic recording device to be hidden in a pocket, for instance, to record conversations without the knowledge of others. Whether the person recording the conversation has a good faith basis to do so, the discovery of an employee making recordings in the workplace can have a destructive effect on employee trust and workplace morale.

Virginia is considered a “single-party consent” jurisdiction. Va. Code § 19.2-62. That generally means that as long as a participant in a conversation consents to the communication being recorded, it is not illegal to record the conversation. However, even if conduct is legally permissible, it may be inconsistent with good workplace practices. This guide provides answers to questions that will aid in the application of state policies to these situations involving employee communications. Nothing in this guide is meant to address the appropriate recording of agency activities to comply with law, such as, for example, the Virginia Freedom of Information Act.

This guidance is not intended to apply to situations where recordings are conducted as an accommodation under the Americans with Disabilities Act.

QUESTIONS AND ANSWERS:

1. Can agency management provide directives to staff that prohibit recording conversations?

Yes. Agency managers have the authority and duty to manage the affairs and operations of state government in an effective and efficient manner. Eliminating conduct that can negatively impact workplace morale is consistent with that goal. An agency manager should consult and receive the approval of agency human resources before such directives are put in place. The agency must clearly communicate these directives to applicable staff so that expectations are understood. It is additionally important that such directives be applied consistently within the agency. Directives should be issued in advance rather than on an *ad hoc* basis. Accordingly, the directives should be in writing, whether or not included within a formal agency policy. Agencies should consult with the Office of the Attorney General as appropriate for legal guidance.

2. If agency management does not provide a directive prohibiting recordings, is it permissible behavior?

Yes, absent prohibition in the specific circumstances. Unless agency management specifically prohibits recording of conversations in the workplace, no state policy generally prohibits this conduct (as long as the employee making the recording is a participant in the conversation).

3. Can employees record conversations in which they are not participating?

No. Employees may not record such conversations. If this conduct occurs, human resources and the Office of the Attorney General should be contacted immediately as the actions could be a violation of criminal law.

4. What circumstances should agency management consider in developing and applying these directives?

Agency management should take into account the particular circumstances applicable to its work environment(s) and how individuals could be impacted to determine when recording conversations would be appropriate. For example, when an employee's conduct is authorized pursuant to legal authority (such as a law enforcement investigation), recordings are made to document an internal investigation, or if recording conversations is to accommodate an employee's disability, a general prohibition might not apply. In most circumstances, when recording conversations is management-initiated, the recording should be open and obvious to all participants. Agency management should also take into account those work environments in which recording conversations would be inappropriate, such as those involving medical and other confidential information.

5. If an employee asks to record a conversation, can agency management say “no”?

Before prohibiting such a recording, agency managers should inquire as to the reasons for an employee's perceived need to record the conversation. The employee's explanation should be taken into account. Agency managers would have the discretion to permit recording such a conversation or also direct that the conversation not be recorded. Agencies must ensure that such permissions and prohibitions are provided consistently and not for any improper purpose.

6. If an employee records a conversation, should the manager also record the conversation?

Another approach to an employee who permissibly records a conversation might be for the manager involved to also record the conversation. Having a separate recording can mitigate against the risk of a recording being altered improperly.

7. What are alternatives to recording conversations if there is a prohibition in place?

There may be legitimate concerns that employees are attempting to address by making recordings of workplace interactions. Communication problems amongst co-workers or between a subordinate and supervisor can lead to a variety of issues. Employees could perceive that the creation of a verbatim recording of conversations will eliminate confusion. However, where agency management has prohibited such recordings, there are alternative ways to address communication difficulties. For example, follow-up e-mails could help clarify expectations. Employees should address specific situations with their human resources offices or contact the Office of Employment Dispute Resolution (1-888-232-3842; edr@dhrm.virginia.gov).

If an employee feels s/he is being harassed or bullied, the employee should address the concern with the agency's human resources office so that an investigation may be conducted in accordance with DHRM Policy 2.35, *Civility in the Workplace*.

8. What are the consequences for employees who do not adhere to management directives about recording conversations in the workplace?

Employees must adhere to all reasonable management directives, including those about the recording of conversations. Absent special circumstances that would specifically authorize the employee's behavior, an employee who violates a manager's directive would be subject to appropriate disciplinary action under the *Standards of Conduct*, or other applicable policies on employee conduct.

9. Can a recorded conversation be considered in a workplace investigation (such as related to a complaint of harassment, the Civility in the Workplace policy, and/or an employee grievance)?

Yes, a recording could be considered by agency decision-makers in a workplace investigation to the extent the content of the recording is relevant to a workplace matter. If a recording contains information that is protected by a legal privilege (such as legal advice by an attorney) or otherwise private, the recording does not make the information any less privileged or private. In such cases, it may be inappropriate to consider the information contained in the recording.

- a) **Does this answer change if the recording was done in violation of an agency directive not to record conversations?** It depends. There may be some circumstances in which it would be inappropriate to consider such a recording. However, there is no other provision of state policy that prohibits agency management from considering the content of such a recording. It may be a better practice to ensure that the content of the recording is reviewed to determine the nature of evidence in the recording. The agency should consult with the Office of the Attorney General to discuss any legal considerations in use of the recording.
- b) **What if the recording was made without the consent of anyone in the conversation?** The content of this type of recording should not be considered. Agency management should contact the Office of the Attorney General or other proper authorities to address whether the recording was criminal conduct.

10. Who should be able to access a recording held by the agency?

While it may depend on the content of the recording, in general, treat the recording as you would a document addressing a personnel matter. Please refer to DHRM Policy 6.05, *Personnel Records Disclosure*, for further information.