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RECORDING WORKPLACE CONVERSATIONS IN CANADA VERSUS THE UNITED STATES

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By Eric Kay and Sara Jodka

There has been a recent trend whereby one party to a workplace conversation secretly records it and then attempts to use it as evidence against the other party. Typically, but not always, the recording party is the employee.

The law in Canada allows one party to a conversation to make a recording of a conversation without the other party consenting to the recording or even knowing that the recording is taking place. The only limitation on this right to record is that the

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recording party must be an active participant in the conversation rather than just a witness to a conversation taking place between other parties.

The upside for an employee who is secretly recording workplace conversations is that such recordings can provide evidence of abusive or improper behaviour on the part of a co-worker, a supervisor or management. The downside of engaging in such recording is the loss of confidence or even animosity that may result when the recording is discovered or disclosed to others.

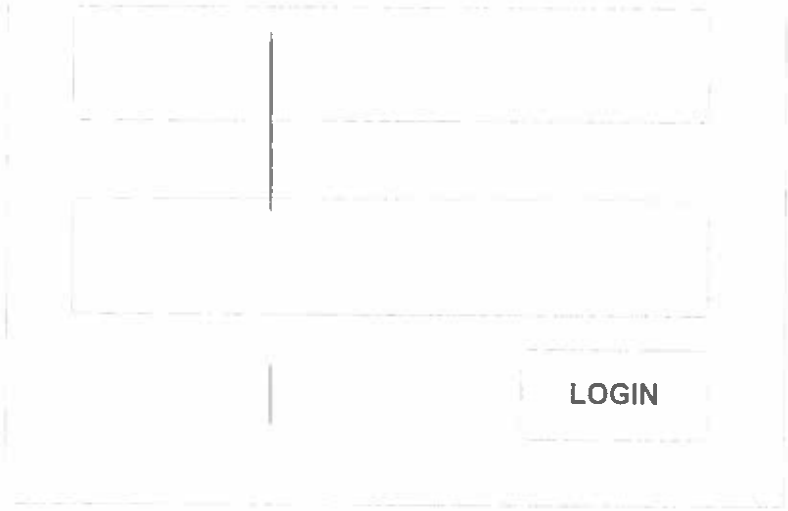
Depending upon the province of employment and whether the employer is a federally or provincially regulated employer, a provincial privacy act or the *Federal Personal Information Protection and Electronic Documents Act* may impact the collection, use and disclosure of personal employee information by way of a recording.

In the United States, it is not illegal in most states for an employee to secretly record their supervisor or management during meetings where performance issues or discipline are being discussed. U.S. law on the issue varies by state and there are two different types of laws. One-party consent states, which only require consent of one of the parties to the conversation being recorded and all-party consent states, which require the consent of everybody involved in a conversation before the conversation can be recorded. One-party consent states make up the majority as there are only eleven all-party consent states: California, Florida, Illinois, Maryland, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington.

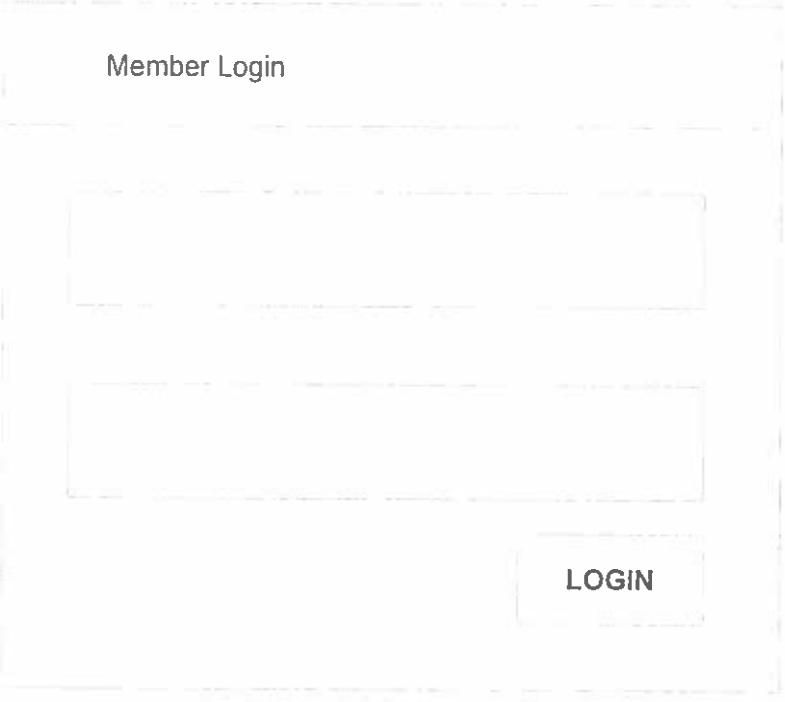
The other issue in the US is in regards to employment policies as some American employers have adopted policies prohibiting secret recordings in the workplace. On this issue the National Labor Relations Board ("NLRB") has taken the position that such policies could reasonably be construed to ban protected concerted activity under the *National Labor Relations Act* ("NLRA"). In a recent case, the NLRB reviewed Whole Foods Market, Inc.'s policy banning employees from recording conversations with other employees and held that the rule violated the NLRA. The Second Circuit upheld the NLRB's decision. *See Whole Foods Mkt. Group., Inc. v. N.L.R.B.* No. 16-0002-AG, — F. App'x —, 2017 WL 2374843 (2d 2017). Accordingly, in the United States, employers should assume any disciplinary or controversial conversation might be recorded and conduct themselves accordingly.

While the Second Circuit has upheld the NLRB's position against no-recording policies in the workplace, the Court did hold that not every no-recording policy will necessarily infringe on employees' Section 7 rights under the NLRA. But a lawful policy would have to be very narrowly drafted so that it only protects the employer's interests without interfering with employees' protected activities. Specifically, the Second Circuit stated:

Even if a rule does not explicitly restrict protected activity, the Board has determined that the rule will constitute a violation if: "(1) employees would reasonably construe the language to prohibit



activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of



rights."

Whole Foods Mkt. Group., Inc., citing *Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am., AFL-CIO v. N.L.R.B.*, 520 F.3d 192, 197 (2d Cir. 2008).

In Canada, it is permissible to have a workplace policy banning the secret recording of workplace

conversations. In a recent case, *Hart v. Parrish & Heimbecker* (2017 MBQB 68), breaching such a policy was found to amount to a breach of confidentiality and trust such that the employer was justified in terminating the employee for cause.

Employers in both Canada and the US should resist the temptation to secretly record disciplinary and other workplace conversations. Aside from employers often being held to a different standard than employees or such an action breaching applicable privacy law, an employee might well claim an invasion of privacy against an employer who engages in such conduct.

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