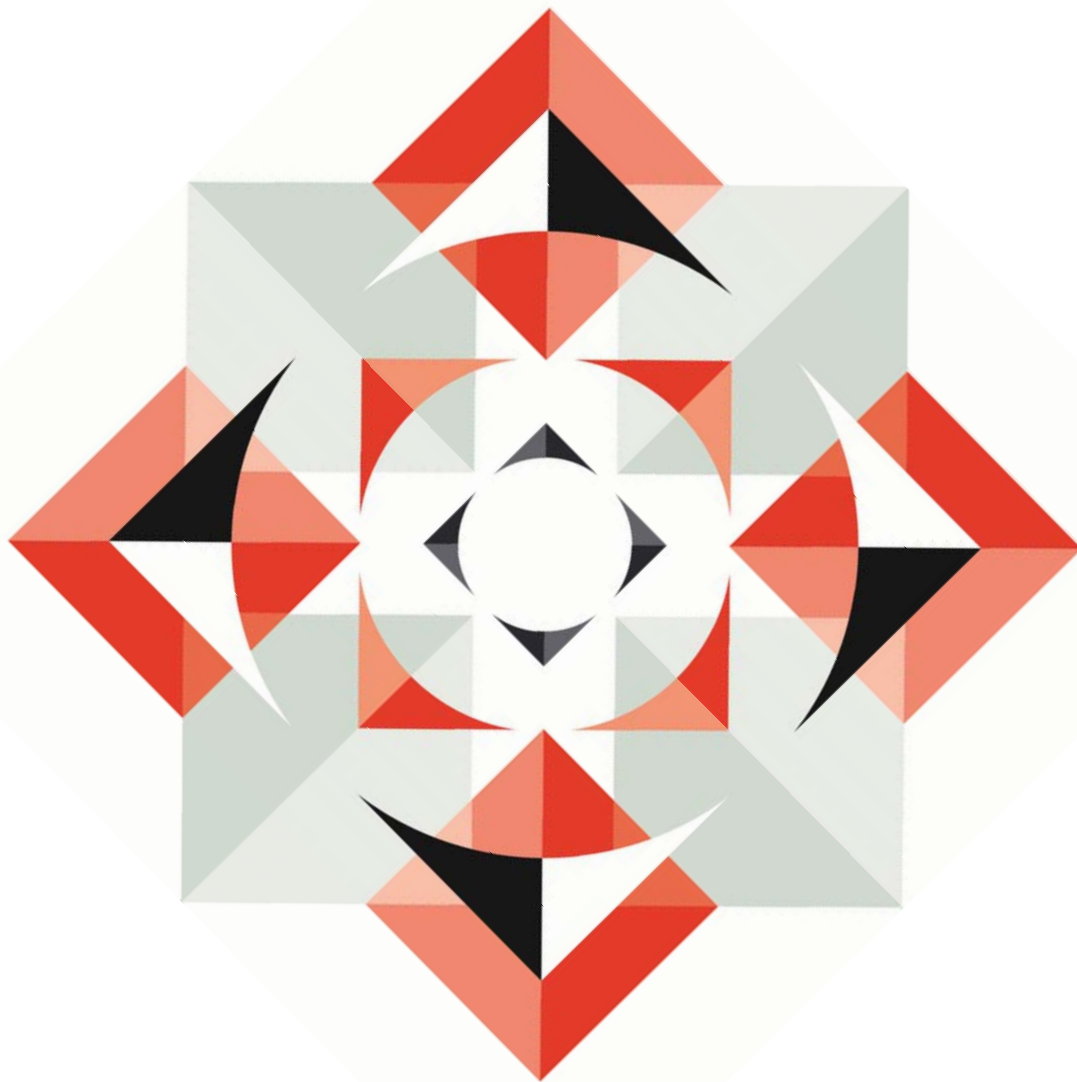


# Tape measures - tackling the risk of employee recordings



## ► Inside

- The problem with covert recording
- The law relating to covert recordings
- Recording in the workplace in practice
- Can employees rely on covert recordings in a tribunal?
- Reducing compensation awards
- Practical steps



## Introduction

Modern technology has made it increasingly easy for employees to make covert recordings in the workplace. This can be done in different contexts and for a variety of reasons, but is rarely something that the employer would want to take place.

This Inbrief considers the practical and legal challenges presented by covert recordings made by employees in the workplace and suggests practical steps an employer should take to tackle the issue.

## The problem with covert recording

Thanks to mobile phones, recording technology is something that most of us now have at our fingertips. Body wearable video is becoming increasingly common; small button video cameras can be bought for less than £30. Head-mounted devices incorporating video recording such as Google Glass are now available. Recording of workplace interactions by employees – either openly or covertly – is also becoming more common. Employers need to be aware of the risks and issues thrown up by employee recordings.

Employees may record workplace interactions covertly in a number of contexts:

- > Colleagues – perhaps as part of a course of harassment by the individual making the recording, or to make a record of bullying or other unpleasant behaviour;
- > Managers – in routine management exchanges such as 1:1s or appraisals;
- > Consultation meetings;
- > Grievances or disciplinary processes.

There have even been cases of employees setting up apparatus to record management discussions at which the employee was not present.

Most people have better things to do than to make real-time records of their life at work. Usually recording is triggered by “an issue” about treatment or performance. Covert recordings may come to light when shared with colleagues, when published through social media, or in the context of workplace processes such as grievance hearings.

Recordings at work raise issues about privacy – and about the rights of those who have been recorded. It is hard to think of many things that undermine normal work relations as much as covertly recording one's colleagues.

## The law relating to covert recordings

Covert recording of others in the workplace is regulated by both legislation and basic principles of contract.

- > *Data Protection Act 1998* – Recording a

conversation or filming involves collecting ‘personal data’ (broadly speaking, information relating to a living individual who can be identified from that data). Ordinarily, the person making the recording is a ‘data controller’ and must comply with rules in relation to the collection and storage of the data. This would apply to employers who make covert workplace recordings. The position of an individual employee is less clear. Most individual use of data is covered by an exemption for the processing of data for reasons relating to ‘personal affairs’. Keeping of phone numbers and addresses about friends would fall within the exemption's scope. It seems unlikely that it would extend to cover covert recording in a work context.

- > *Human rights* – Article 8 of the European Convention on Human Rights provides that every individual has the right to respect for their private life. This may apply in the workplace. A person who is covertly recorded may argue that obtaining and using the recording is in breach of his or her right to privacy. Human rights legislation cannot be directly enforced against private entities, but in an employment context a tribunal will so far as it can interpret other aspects of the law compatibly with human rights principles.

*Contractual Principles* – Secretly recording a colleague or a manager in a workplace context may breach an employee's implied contractual obligation of trust and confidence. The underhand nature of covert recordings is likely to damage the relationship of trust and confidence between employer and employee. To emphasise this, employers should include an express prohibition on covert recording in a contract of employment or associated policies and make it a disciplinary offence.

## Recording in the workplace in practice

Two common scenarios in which an employer may be faced with covert recordings made by an employee are explored below.

### *Proving misconduct by others*

Given the ease with which a conversation can be secretly recorded, an employee seeking to prove misconduct by a colleague or manager



may try to catch the culprit red-handed by obtaining a recording of the offending behaviour. An employer may be asked to take disciplinary action in light of the covert evidence or to consider it as part of a formal grievance process.

For example, an employer may be presented with a recorded conversation which the employee claims demonstrates discriminatory behaviour. Although the employer may not condone the way in which the evidence has been obtained, the substance of such a recording cannot be overlooked, particularly if the allegations are serious. The employer is required to take all reasonably practicable steps to prevent discrimination in the workplace, and this means the employer should act on the information.

In most cases, the employer should take steps to investigate the matter further, with a view to taking disciplinary action if appropriate. It is important that the individual who has been recorded is given the opportunity to comment on the evidence. He or she may present a different interpretation or claim that the recording takes a comment out of context.

The person recorded may also make a complaint to the employer claiming that covert recording breaches his or her right to privacy, and that use of the recording by the employer breaches data protection law.

The employer may consider disciplining the employee who made the recording, and it would be helpful if this is covered within internal policies. However, where the employee is complaining about discrimination, the employer must be careful to avoid victimising the employee for raising the issue. It should be made very clear that any disciplinary action is being taken because of the manner in which the evidence was obtained rather than because a complaint has been raised.

Given the unobtrusive nature of the technology, provisions in policies will not of course prevent recording from happening. However, they may deter such conduct and, if it occurs, provide a firm basis for the employer taking action against it. Dealing effectively with complaints through a grievance process will also reduce the likelihood of employees taking things into their own hands.

### *Recording of formal meetings*

Another situation in which covert recording arises is where an employee secretly records internal management processes - whether an appraisal, a 1:1 meeting, or a grievance or disciplinary hearing. There are even cases in which an employee has recorded the private deliberations of managers. If the employee believes it helps his or her case, the evidence may be used in an appeal against the decision, or as part of an employment tribunal claim.

In some respects covert recording of a formal meeting is less intrusive than recording of normal work interactions. If the meeting is formal, both participants should anticipate that some sort of record will be made and should be wary of making inappropriate unguarded remarks.

Employees sometime ask for a meeting to be recorded - or ask if they can record it themselves. Although not as damaging as making a covert record, experience shows that recordings can be hard to follow. If the recording is relevant at some point (perhaps because it is used in a tribunal hearing) the management time in listening to it and the cost of transcribing mean that it adds considerably to an employer's expense without delivering much value. A carefully prepared note covering what has been said is a much better approach.

---

### **Can employees rely on covert recordings in a tribunal?**

An employment tribunal has discretion as to the evidence it will consider. Although evidence is normally admissible if it is relevant to the issues to be determined, if it was obtained by deception a tribunal may order that it be excluded as a matter of public policy or because admitting it would breach human rights legislation.

The tribunal has a broad discretion over the factors it can take into consideration. Although the tribunal may express disapproval over evidence obtained in an underhand manner, the fact that covert recording has happened is not in itself a bar to such evidence being taken into account. Employers should not assume that evidence will be excluded by a tribunal merely because it was obtained covertly and in clear breach of the employer's policies. Deciding this

point requires a balancing exercise between the relevance of the evidence, human rights and public policy.

What has emerged from previous court decisions is that the tribunal is likely to exercise its discretion to admit evidence of this nature if it is relevant to significant matters arising in the case. However, the evidence may be excluded if:

- > it refers to privileged discussions (such as legal advice obtained in relation to a redundancy exercise); or
- > it refers to private discussions relating to a disciplinary or grievance matter, where the managers involved had an expectation that their deliberations would be private. However, even in these circumstances the tribunal may admit evidence if the recording shows evidence of discrimination.

---

### **Reducing compensation awards**

If a covert recording clearly shows unfair or discriminatory behaviour by the employer, it will be damaging to the employer's case irrespective of the way in which it was obtained. It may lead to an employer losing a claim in tribunal. However, even if the employer loses a claim, it may be able to show that compensation should be reduced to reflect the chance that the employee would have been dismissed in any event for making covert recordings. For example, if an employee succeeds in showing she was unfairly dismissed, the employer may demonstrate that she would have been dismissed fairly for making a covert recording. The argument for reduced compensation will be stronger if the employer can point to clear statements in policies regarding covert recording, showing that it always treats such matters seriously with consistent enforcement and probable dismissal.

---

### **Practical steps**

Covert recordings are most likely to prove problematic for an employer when they are made outside a formal management context. In meetings in which minutes would ordinarily be taken, the participants are likely to be "on guard", and the recording less damaging. However, it is more difficult in less formal contexts. "Careless talk" is unlikely to

cost lives but, in this context, may cost money.

There are various practical steps employers can take to strengthen their position; by trying to prevent covert recordings being made, by taking action against those who make them and by limiting the damage done by such recording:

- > Explain how covert recording may undermine trust between individuals.
- > Have a clear policy prohibiting covert recording in the workplace and treat it as serious misconduct, perhaps indicating that dismissal will be the normal consequence.
- > Establish a rule that any recording of a colleague must be by consent.
- > Remember that staff may want to take photos of each other on work social occasions in which it is not practicable to seek consent, so ensure that the policy does not inhibit normal and accepted social behaviour.
- > Encourage managers to avoid saying anything which may suggest bad faith or discrimination.
- > Have clear rules on minute taking. Provide a copy of minutes to the employee. If appropriate, allow the employee to identify anything which he or she claims is inaccurate.
- > If anxious about hidden recording devices, consider moving to a different location for deliberations on what action to take following a disciplinary or grievance hearing.

For further information on this subject please contact:

**Steven Lorber**

Consultant Partner

T + 44 (0) 20 7074 8078

[steven.lorber@lewissilkin.com](mailto:steven.lorber@lewissilkin.com)