employment alert

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in this issue

Video Surveillance: Stay on the Right Side of the Law

Maureen Minehan

4.1 You have an employee you suspect is slacking off, but his remote location makes it difficult to routinely check on him. You install a video camera so you can monitor his activity and he cries foul when he finds out. He claims he has ample grounds for a lawsuit alleging you have invaded his privacy. Could he possibly be right?

Yes, if you failed to take steps to protect yourself under federal and state laws addressing video surveillance in the workplace. Courts have found in favor of employees when their employers did not take appropriate steps to balance their right to manage and monitor their workplace against employees' expectations of privacy. In some cases, employers do not even have to have actually recorded employees to be found liable for a surveillance-related claim.

***Koeppel v. Speirs*.** Take a case decided by the Iowa Supreme Court in December [*Koeppel v. Speirs*, 2011 WL 6543059 (Iowa 2011)]. Sara Koeppel and Deanna Miller, two employees of an insurance office, alleged that Robert Speirs, the insurance agent in charge of the office, placed a video camera in the women's bathroom, ostensibly in response to his concerns about Miller's job performance and possible drug use.

After discovering the camera, Koeppel and Miller filed suits alleging invasion of privacy and sexual harassment. Speirs argued the women's privacy was not invaded because the video camera did not actually work and he never recorded or viewed any footage. A district court granted Speirs summary judgment, but an appeals court reversed, ruling that a video camera merely had to be capable of recording video to be a potential invasion of an employee's privacy. A police investigation had shown that the recording device placed in the bathroom by Speirs was operational once new batteries were installed.

The Iowa Supreme Court also sided with the women: "An electronic invasion occurs…when the plaintiff establishes by a preponderance of evidence that the electronic device or equipment used by a defendant could have invaded privacy in some way."

The case was remanded back to the lower court for further action. Speirs could be vulnerable—both the location of the video camera and lack of notice to employees have undermined employers' defenses in the past.

Legal requirements. Karen McGinnis, an attorney at Moore & Van Allen in Charlotte, says there are several laws that determine what employers can and can't do when it comes to video surveillance. "The laws that govern video monitoring mainly break down into common law claims such as intentional infliction of emotional distress or invasion of privacy."

"In addition, the federal Electronic Communications Privacy Act (ECPA) applies to video monitoring and some states have their own version of the ECPA. The common theme running throughout all the laws is balancing an employer's interests against employees' expectations of privacy," McGinnis says.

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In general, McGinnis says, employers have the right use video surveillance as long as they do not conduct it in areas where employees have a reasonable expectation of privacy, such as bathrooms and locker rooms. They also have to make sure video surveillance is not prevented under the terms of any labor agreement that have signed.

Articulating a compelling business reason for the monitoring can help reduce the risk of potential litigation. Typical examples include concerns about productivity or illegal activity. An eyeglass boutique in Westport, Connecticut, is one company that should be able to mount a strong defense of its surveillance if needed; according to The Hour, a local newspaper, video surveillance inside the store captured an employee making more than $5,000 in fraudulent returns while on the job.

Steps to take. Steps employers can take to significantly reduce their risk of federal, state or common law claims include:

Review state law. Employers need to understand their rights and obligations under the laws in the states in which they operate.

Be reasonable. Only place cameras where there is a legitimate business need for monitoring. Locker rooms and bathrooms should be off limits, unless there is compelling evidence the employer should be concerned about safety or illegal activity in those locations.

"Put cameras in locker rooms and bathrooms only if there is significant concern about safety or illegal activity. Provide clear notice and separate, camera-free areas, for changing. You can say something like 'there have been a series of thefts in our locker rooms so we are going to be installing cameras. We've set up a separate area for changing that will be camera-free….'" McGinnis says.

Provide notice. This can range from signage in areas where monitoring occurs ("this area is monitored by video") to a formal policy in the employee handbook. The Texas Work Commission offers sample language for the latter:

> I…understand that in order to promote the safety of employees and company visitors, as well as the security of its facilities, XYZ may conduct video surveillance of any portion of its premises at any time, the only exception being private areas of restrooms, showers, and dressing rooms, and that video cameras will be positioned in appropriate places within and around XYZ buildings and used in order to help promote the safety and security of people and property. I hereby give my consent to such video surveillance at any time the company may choose.

Obtain consent. "If you have employee consent, it's a good defense," McGinnis says. Explicit written consent is the best, but employers can also point to implied consent if they include a line in their video surveillance policy stating that employees who continue to work after receiving their copy of the policy are considered to have consented to the policy.

Beware of union issues. Employers also need to be cognizant of potential conflicts under the NLRA. "Labor unions may negotiate limitations on video recordings of unionized workers. In 1997, the National Labor Relations Board ruled that surveillance was subject to mandatory bargaining, meaning a union must agree to any monitoring of unionized workers. This includes the use of hidden cameras," says the Privacy Rights Clearinghouse.

Placing cameras in break rooms or other areas where employees congregate could also be problematic unless sufficient notice is given. "Don't zero in on par-

ticular employees or use video to try to instill fear or discourage organizing activity," McGinnis warns.

Record in silence. "Even if you never make an audio recording, if the video camera used has the ability to record sound, you're getting much deeper into ECPA issues. Without employee consent, ECPA severely restricts what you can do with sound recordings in the workplace so make sure any capacity for recording audio is disabled," McGinnis advises.

The bottom line. Video surveillance can be useful to employers, but cameras must be deployed carefully so they don't increase the chances of litigation. Consent is also important; it pays off to acquire either explicit or implied consent before any video surveillance takes place.

No Documentation = No Options? Not True

Maureen Minehan

4.2 A manager wants to fire an employee because she is surly and uncooperative with her coworkers. The problem? No written documentation of the issue. Despite repeated admonitions to document performance and behavior issues, many managers skip it only to feel hamstrung later when they want to take action against the offending employees.

"These calls come up all the time," says Andrew Gould, a partner at Wick Phillips in Dallas. "The manager says it's been a problem for a year, but there's only been verbal communication about it and they didn't feel the need to document."

Heidi Carpenter, a shareholder at Fafinski Mark & Johnson in Eden Prairie, Minnesota, says lax documentation can make it more risky to fire someone, but does not completely eliminate the possibility. "The reality is you almost never have a lot of documentation unless the manager has been subject to an employee claim before or the HR department at the company has been really insistent."

Steps to take. Lonnie Giamela, a partner in the Los Angeles office of Fisher & Phillips LLP, says the first step employers should take is to assess what they do have. "Are there objective facts you can point to such as the employee clocking in late three times in the past two weeks?"

Despite repeated admonitions to document performance and behavior issues, many managers skip it only to feel hamstrung later when they want to take action against the offending employees.

"It's always easier if the problems are something quantifiable, such as not hitting sales numbers vs. having a bad attitude. Still, while there might not be official documentation, there have usually been less formal attempts to correct the behavior. Employers should look for other ways to show there have been problems. The manager might, for example, be able to provide emails capturing what transpired—'I see you were late again today'—or have a list of customer complaints," Carpenter says.

There also may be some safety in numbers. "Talk to more than just the manager who wants to fire the employee to see if others have seen the same problems," Giamela says.

Past disciplinary actions also must be considered. "Ask whether others have been terminated for similar actions or behavior. If they have, it makes it easier to justify the termination," Giamela says.

Protected characteristics or recent complaints are another consideration. "Is the employee part of a protected class based on age, sex, religion, race, known disability? Has the employee recently taken any type of leave—military, medical, family, workers comp? Those statutes all prohibit retaliation," Carpenter says.

"If the employee has recently filed a complaint or requested leave, the optics won't look good if termination comes soon after and without documentation. The lack of documentation makes convincing people there's no link even harder," Gould says.

Recent praise is also challenging to overcome. "Are there any recent documents indicating the employee's performance has been good, such as a great recent performance review or winning a company award? Employers need to consider the things that might contradict the manager's position," Carpenter says.

Costs vs. benefits. Once employers have the answers to these questions, they can decide whether the benefits of termination outweigh the risks of proceeding. "Each company has to decide how comfortable it is with risk. Some companies are more willing to roll the dice than others." Gould says.

"Some employers will conclude that termination without documentation is too risky. That's where you start thinking of less aggressive action that's more appropriate, such as performance improvement plans, formal discipline letters or reassignment to a different manager," Carpenter says.

Employers that conclude termination is the best option should consult with legal counsel to ensure the situation is handled in a manner that reduces the odds of a lawsuit. Offering severance pay is one possibility. "It can be a good idea to have a policy or practice of paying severance and obtaining a release to help eliminate risk when terminating with much documentation," Gould says.

Practically Speaking: If you cannot point to written documentation in support a manager's desire to terminate an employee, your hands may not be completely tied. The first step is to consider what you *do* have, e.g., objective facts that would lead a reasonable employer to take similar action for policy violations. The more quantifiable the poor conduct, the better for bolstering your reasoning for the firing.