

Donald Sterling, Clippers fiasco, raises legal questions over recording private conversations

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On April 29th, the National Basketball Association took steps to quell an employee and public relations crisis that was brought on by racist remarks from the owner of the Los Angeles Clippers, Donald Sterling. In addition to levying a \$2.5 million fine, the NBA banned Mr. Sterling from the league for life after a private conversation Mr. Sterling had with a female friend was released to the public. The swift downfall of Mr. Sterling yields another important lesson for owners, managers, and human resource professionals.

Employers should assume that every workplace conversation is being recorded. Almost every employee is armed with a cell phone capable of audio and video recording, and, not surprisingly, the EEOC's Houston office estimates that 1/3 of all complainants coming to their office bring some type of digital evidence with them. Employees can and do use their smartphones, without employer knowledge, to secretly record performance reviews with managers and reasonable accommodation requests with human resource representatives. Such recordings can be legal depending on where the recording was made and can provide a plaintiff with powerful evidence in litigation.

The majority of states, including New York, allow individuals to record conversations to which they are a party without informing the other party to the conversations. Other states, like California, are dual-consent states that require the consent of both individuals to record the conversation.

What can employers do? First, employers should always ensure that management is receiving annual anti-discrimination and anti-harassment training to minimize exposure should a recording surface. Second, employers can institute a policy prohibiting such recordings in the workplace but should consult legal counsel before enacting the policy to ensure that it does not infringe on any employee rights.

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