

# Want to Win Your Whistleblower Claim? Learn How to Legally Gather Evidence

August 23, 2016

When employees want to report on suspected law breaking or misconduct, gathering evidence to become a whistleblower brings with it many legal pitfalls. Some forms of evidence gathering are not only allowed but are considered [protected activity](#) for an employee – that is, an employer cannot take any negative employment action (demotion, suspension or termination) against that employee in response.

On the other hand, some types of evidence gathering can expose the employee to legal liability, potentially even criminal liability. Below, I provide an overview of some of the issues that can come up in a few types of evidence: gathering company documents, taking photos or videos, and recording a conversation. This post is meant to give a broad sense of the legal landscape; as with any issue, you should consult an attorney to take proper steps in gathering evidence for reporting wrongdoing.

## Gathering Documentary Evidence

In many whistleblower cases where an employee wants to report wrongdoing, having documentary evidence is essential to corroborate what that employee reports to the relevant authority – be that an internal compliance or audit entity, or a government agency. Even when [the law generally protects an employee from retaliation](#) for reporting illegal activity, if an employee acts improperly in making that report, her employer may have a legitimate, legal reason to take action against that employee.

For gathering documentary evidence, an employee must be careful in considering what documents to take and the method needed to gain access to documents. An employee who removes confidential information – such as personnel information or proprietary business information, like trade secrets – may be legally unprotected from being fired for doing so, particularly if the employee did not have access to that information in the regular course of his job. Employees should familiarize themselves with an employer's policies regarding confidentiality and other issues that could be implicated by the documents that they want to use.

Of even greater importance, depending on the broader context, employees may break the law by removing certain documents from their workplace, such as medical information protected by the Health Insurance Portability and Accountability Act (HIPAA). On a final note, if an employee takes documents that include communications between company management and the company's attorneys, that information can be protected by the rules of attorney-client privilege. If that's the case, the evidence is likely unusable in future legal proceedings, such as that employee's retaliation claim after being fired.

## Taking Photos or Videos at Work

If an employee sees something unsafe at work – say at a steel plant or at a construction site – she may want to take a photo or video to back up a later report to a supervisor or someone else at the company. Employees should know their company's policy on photos and videos; some place

restrictions on it, and some forbid it entirely. As with other precautions here, the idea is for an employee, who would otherwise be legally protected as a whistleblower, to take all possible steps to prevent giving her employer a legitimate reason to terminate her employment.

Even where there is a policy against taking photos or videos at work, the law may still protect an employee who does so, granted whistleblowing activity is involved. Both the Occupational Safety and Health Administration (OSHA) and the National Labor Relations Board (NLRB) frown upon otherwise neutral policies (like a blanket no-photo policy) that hinder employees from taking protected whistleblowing actions. The NLRB has specifically taken a stand against a policy prohibiting taking photos or video while at work. In a [March 2015 report](#), the NLRB's general counsel stated that a rule prohibiting "taking unauthorized pictures or video on company property" was unlawful because it could prohibit "attempts to document health and safety violations and other protected concerted activity."

## **Recording Conversations at Work**

The most important issue for anyone to consider when recording a conversation, whether to use as evidence or otherwise, is to know state law on the subject. Specifically, some states allow a person to record a conversation without the other participants' permission, and some states do not. For example, Virginia is a "one-party consent" state, meaning that a person generally does not need another person's permission to legally record a conversation between the two. Maryland, on the other hand, requires consent of everyone involved in a conversation in order for a recording of that conversation to be legal. Note that similar rules apply to telephone calls, and legal issues can arise for a recording where different people on a call are in different states.

Separate from the general legality of a recording, an employee recording a conversation with a supervisor can become essential evidence in whistleblower cases. Many employers are careful not to put in writing anything that would even suggest illegal activity - whether it be the subject of a whistleblower's reporting or subsequent retaliation against a whistleblower. Recording those conversations, within the bounds of the law, can provide crucial evidence so the situation does not become the employee's word against the employer's about what was said.

Finally, such a recording can itself be protected activity, making it an illegal reason to take action against an employee. The Department of Labor's Administrative Review Board (ARB) recently ruled in [Franchini v. Argonne National Laboratory](#) that an employee who recorded conversations at work related to workplace safety engaged in protected activity by doing so. The ARB ruled that the employee would be able to win his retaliation claim if he goes on to prove his employer terminated him because of those recordings.