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Illinois Supreme Court Strikes Down Prohibition on Non-Consensual Audio Recordings, Raising New Issues for Employers

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Illinois employers had been able to rely upon Illinois' prohibition against all non-consensual recording of conversations, whether private or not. As of March 20, 2014, that prohibition no longer exists.

In two companion cases that arose outside of the employment context, the Illinois Supreme Court invalidated Illinois' eavesdropping statute, 720 ILCS 5/14-2 (the "Statute"), reasoning that its broad prohibition against all non-consensual recording of conversations and publishing those recordings violated the First Amendment of the United States Constitution.

These decisions highlight the need for Illinois employers to revisit or implement thoughtful policies prohibiting workplace recording. Without a statute prohibiting this conduct, employers seeking to limit or prohibit audio recording will need policies that address this issue consistent with their culture and applicable law, including principles under the National Labor Relations Act (NLRA). In addition, multi-state employers should be prepared to see constitutional challenges to eavesdropping/wiretapping statutes in other states that, like Illinois, require that all parties to recorded conversations consent to the recording. However, given some of the unique elements of the Illinois law, these challenges will likely fail.

The Statute

The Statute provides, in relevant part:

> (a) A person commits eavesdropping when he:
>
> (1) Knowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation or intercepts, retains, or transcribes electronic communication unless he does so
>
> (A) with the consent of all of the parties to such conversation or electronic communication. . .[1]

1 720 ILCS 5/14-2.

"Conversation" is defined as: "any oral communication between 2 or more persons ***regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation***."[2] This emphasized language was at the center of the Illinois Supreme Court's reasoning because it extends the statute to the recording of ***any*** conversation, without regard to its intended privacy. Both the Illinois Supreme Court in its recent decision and the U.S. Court of Appeals for the Seventh Circuit in a case decided two years ago,[3] relied on this language in finding constitutional infirmities in the Statute. The Illinois Supreme Court borrowed heavily from the Seventh Circuit's reasoning in *Alvarez* to invalidate the Statute.

The *Clark* and *Melongo* Decisions

In the first case, *People v. Clark*,[4] the defendant used an "eavesdropping" device to record a court hearing regarding child support, and a conversation with opposing counsel in the court's hallway before the proceeding. The circuit court held that the Statute violated both Clark's right to substantive due process and his First Amendment rights. Before the Illinois Supreme Court, Clark argued that section (a)(1)(A) was overbroad because it captured conduct beyond the legitimate government interest in protecting conversational privacy.

In evaluating Clark's argument, the Illinois Supreme Court first concluded that the Statute was too broad as it, with limited exception, criminalizes the recording of all conversations. Recognizing that the right to make an audio recording is encompassed within the protections of the First Amendment and the Statute is "content-neutral," the Illinois Supreme Court applied intermediate scrutiny. Accordingly, it evaluated whether the Statute advances important government interests unrelated to suppression of free speech and does not burden substantially more speech than necessary to further those interests.

The court concluded that the Statute failed this test because it burdens substantially more speech than necessary to serve the legitimate interests of the Statute. In reaching this conclusion, the court considered that the objective of the Statute is to protect conversational privacy. The court recognized that this is a valid interest and acknowledged that the fear of having private conversations exposed could have a potentially chilling effect on private speech. However, the Statute protects all conversations regardless of whether they are private. For instance, the Statute criminalized recording a political debate in a park or a loud argument in the street, situations where there is no expectation that the conversation would be private. As the court noted, "the Statute's blanket ban on audio recordings sweeps so broadly that it criminalizes a great deal of wholly innocent conduct, judged in relation to the Statute's purpose and its legitimate scope."

In the second case decided the same day, *People v. Melongo*,[5] the defendant was convicted of recording three telephone conversations with the Assistant Administrator of the Cook County Court Reporter's office, all related to the defendant's request for revision of a transcript that inaccurately stated that the defendant had been present in court when she had not.

The Illinois Supreme Court first addressed the defendant's First Amendment argument that the Statute was overbroad. Citing its decision in *Clark*, the court held that the recording provision burdened substantially more speech than necessary to serve the legitimate state interest in protecting conversational privacy. The court next addressed Melongo's argument that the "publishing provision" of the eavesdropping Statute that criminalized the publication of any recording made on a cellphone or other device, was also unconstitutional. The court agreed, concluding that because the "recording" provision violates the First Amendment, so too does the "publication" provision.

Taken together, these decisions wholly invalidate the Statute.

Impact of the Decisions

At first blush, the Illinois Supreme Court's decisions appear to leave other state wiretap laws, and particularly those in the 12 remaining states that require all parties' consent, susceptible to constitutional challenge under the First Amendment. However, deeper analysis suggests that result is unlikely. As noted above, the law struck down by the Illinois Supreme Court expressly criminalized the recording even of communications that the speaker could not reasonably expect to be private. For example, in *Clark*, several of the recorded conversations that resulted in conviction occurred in open court and the courthouse hallway.

2 720 ILCS 5/14-1(d) (emphasis added).

3 *American Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012).

4 2014 IL 115776 (2014).

5 2014 IL 114852 (2014).

By contrast, virtually all analogous eavesdropping or wiretapping laws expressly or implicitly apply only to private communications. California's law, for example, applies only to "communication[s] carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto," and that law expressly "excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." Many states—including Florida, Nevada, New Hampshire and Pennsylvania—have adopted a definition of "oral communication" under the state's wiretap law similar to the following: "any oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation." These definitions focus the laws on the legitimate government interest in protecting conversational privacy.

Furthermore, the judicial brainchild for the Illinois Supreme Court's decision—the Seventh Circuit's decision in *American Civil Liberties Union of Ill. v. Alvarez*[6]—expressly rejected the notion that its decision to enjoin enforcement of the Illinois wiretap law on First Amendment grounds would "cast[] a shadow over the electronic privacy statutes of other states." In reaching that conclusion, the Seventh Circuit emphasized that Illinois' overbroad law is "a national outlier" because it expressly criminalizes recording speech that is not private. The court also emphasized that the wiretap laws in other states are "closely tailored to the government's interest in protecting conversational privacy" because they apply only to private communications.

Multi-state employers may see constitutional challenges when they seek to enforce an all-party consent wiretap law against an employee who secretly recorded conversations with a manager or co-workers. However, given the unusually broad wording of the invalidated Illinois law and the self-imposed limitation on the holding in *Alvarez*, those challenges will likely fail.

Continued Considerations Despite These Decisions

Illinois employers should note that even without a wiretapping law, they still must examine their practices, and take risk mitigation measures, when using technology to record communications. For example, monitoring or recording calls between customer service representatives in Illinois and customers in one of the 12 remaining states with all-party consent wiretap laws could trigger liability under the wiretap law of the customer's state if the customer is not notified that the conversation is being monitored and/or recorded.

As another example, an Illinois employer could be exposed to a common law claim for invasion of privacy were the employer to capture an otherwise private conversation using a concealed surveillance camera with audio capability.

On the other side of the equation, these decisions do not leave employers helpless in the face of employees' surreptitious recording of conversations in the workplace. The First Amendment generally does *not* apply to private employers. Consequently, notwithstanding the Statute's invalidation, employers can still implement policies that prohibit workplace recording.

However, employers must be mindful of the National Labor Relations Board's (NLRB) position on recording policies. The NLRB's former acting General Counsel took the position that employer policies prohibiting workplace recording chilled employees in the exercise of their Section 7 rights in violation of 8(a)(1) of the NLRA. In the one decision on point, an administrative law judge disagreed with the General Counsel's position, and held that the employer had not violated the NLRA by prohibiting employees from recording conversations with a recording device.[7] The NLRB's current General Counsel has appealed that decision to the NLRB, which has not yet issued its opinion.

What Is An Illinois Employer To Do?

Illinois employers should review their current policies. Those without policies addressing recording in the workplace should thoughtfully determine whether a policy would be appropriate. Key considerations for a "no recording" policy include the following:

- The employer should specify the legitimate business justification for the ban in its "no recording" policy
- Preventing the "chilling effect" on internal company discussions can be a legitimate business justification for a "no recording" policy

6 679 F.3d 583 (7th Cir. 2012).

7 *See* Phillip L. Gordon, *ALJ Holds Employers Can Ban "Gotcha" Audio Recordings From The Workplace*, Littler's Workplace Privacy Counsel Blog (Nov. 6, 2013), http://www.littler.com/workplace-privacy-counsel/alj-holds-employers-can-ban-gotcha-audio-recordings-workplace.

- An employer that does rely on the importance of frank workplace discussions to justify a "no recording" policy should be prepared to provide examples of specific situations where (a) recording in the workplace would inhibit frank discussions, and (b) that inhibition materially undermines the employer's legitimate and important business objectives
- Whatever the justification, apply the policy to all employees, not just to non-management employees
- Employers with unionized operations should work with experienced legal counsel to ensure that implementing or modifying a "no recording" policy is lawful and within their rights under the NLRA and the applicable collective bargaining agreement

Illinois employers should also review their recording practices, recognizing that risk can often be most effectively minimized by providing employees and customers with robust notice of monitoring and recording practices and obtaining implied, if not express, consent. Where notice and consent are not an option, the employer should scrutinize the location where conversations will be recorded to confirm that speakers could not reasonably expect privacy there.

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