

CASE SUMMARIES

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Criminal Law /Labor Law

Illinois' Newly Amended Eavesdropping Statute Poses Challenges for Employers

Illinois' controversial eavesdropping statute was finally amended, effective December 30, 2014, to replace the version of the statute that the Illinois Supreme Court struck down as unconstitutional in March 2014. The amended statute attempts to remedy the constitutional infirmities identified by the Illinois Supreme Court. Most significantly, the amendments narrow the statute to permit recording of conversations in public places, such as courtrooms, that no person reasonably could expect to be private. The challenge for employers, especially in an era when surreptitious audio recording requires only the tap of a smartphone "app", is that the revised statute sets ambiguous standards for determining whether a recording is unlawful.

The revised law generally prohibits the use of any "eavesdropping device" in a "surreptitious" manner to capture a "private conversation." The definition of each of the first two quoted terms is straightforward. An eavesdropping device is any device that permits hearing or recording of a conversation, such as a recording app on a smartphone. The use of an eavesdropping device is surreptitious if it is done with stealth, deception, secrecy or concealment.

Whether a conversation is a "private conversation" likely will be much more difficult for an employer to determine. Under the amended statute, whether a conversation is a "private conversation" hinges upon whether one of the parties "intended the communication to be of a private nature under circumstances *reasonably* justifying that expectation." The statute further defines a reasonable expectation of privacy as "any expectation recognized by law, including, but not limited to, an expectation derived from a privilege, immunity or right established by common law, Supreme Court rule, or the Illinois or United States Constitution." This general reference to laws is not particularly helpful for non-lawyers. Moreover, the substantial body of case law resolving disputes over whether an individual's expectation of privacy was reasonable demonstrates that this standard likely will be of only limited utility for lawyers. Notably, the statute provides no guidelines or factors — other than the general reference to the law — for determining when an expectation of privacy is reasonable.

While the statute leaves open to debate whether a particular "private conversation" falls within the purview of the revised law, the statute leaves no doubt that Illinois remains firmly within the minority of "all-party" consent states with respect to the

recording of oral communications. More to the point, the revised law requires that all parties to an oral communication consent to the use of an eavesdropping device for that use to be lawful. In a substantial majority of states, surreptitious recording of oral communications is legal as long as one party, usually the person making the recording, consents.

Further complicating matters, the revised Illinois law appears to establish a "one-party" consent rule for electronic communications. The revised statute prohibits only someone who is not a party to a conversation from surreptitiously using an eavesdropping device to intercept, record or transcribe a "private electronic communication." A private electronic communication is defined as "any transfer of signs, signals, writing, images, sounds, data, or intelligence . . . transmitted in whole or part by a wire, radio, pager, computer, electromagnetic, photo or optical system, when the sending or receiving party intends the electronic communication to be private under circumstances reasonably justifying that expectation." Thus, by negative implication, the revised statute appears to permit someone who is a party to a telephone or a video conference to record the call without notifying any other party to the call or obtaining their consent.

The revised statute retains the same criminal penalties for violations as the prior law. The first offense of eavesdropping is a Class 4 felony, while any subsequent offense is a Class 3 felony. In addition, a person victimized by unlawful use of an eavesdropping device may file a civil action to recover actual and punitive damages.

Audio recording in the workplace is becoming an increasing challenge for employers as employees can more easily record business meetings without notice to others. Illinois employers as well as employers with employees who travel regularly to Illinois for business should consider reminding their workforce that Illinois generally prohibits recording of oral communications without the consent of all parties to the recorded communication, while the exact scope of the prohibition remains unclear. As a result, employees should strongly consider following the most conservative approach, *i.e.*, to request permission from all participants in business meetings, whether with one or several persons, before recording the meeting. (CBA/Lexology)