Ogletree Deakins

Illinois Supreme Court Strikes Down Eavesdropping Statute as Overly Broad

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The Illinois Supreme Court recently issued two opinions that together invalidated Illinois' eavesdropping statute, 720 ILCS 5/14-2. The statute, which is part of the Illinois Criminal Code, prohibits a person from "knowingly and intentionally" using an eavesdropping device to record an oral communication between two or more persons without the.....

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Illinois Supreme Court Holds Eavesdropping Statute is Overly Broad

The two cases decided by the court—*People v. Clark* and *People v. Melongo*—involved similar issues. In *Clark*, the defendant Clark was indicted on two counts of eavesdropping under the eavesdropping statute. The first count alleged that Clark, without consent, had recorded a conversation he'd had with his attorney; the second count alleged that Clark, again without consent, had recorded a conversation between a judge, Clark's attorney, and Clark himself. The circuit court granted Clark's motion to dismiss the indictment, holding that the eavesdropping statute was an unconstitutional violation of substantive due process and the guarantees of the First Amendment to the U.S. Constitution, and the case was appealed directly to the Illinois Supreme Court.

In *Melongo*, the defendant Melongo was charged with recording three of her telephone conversations with the assistant administrator of the Cook County Court Reporter's Office, without the assistant administrator's consent. After Melongo subsequently posted the recordings and transcripts of the conversations to her

website, she was charged with three counts of divulging information obtained through the use of an eavesdropping device, which is also a crime under the statute. Unlike the circuit court in *Clark*, the lower court denied Melongo's motion to dismiss the charges. However, after the case proceeded to trial and a mistrial was declared, a second judge granted Melongo's motion to declare the statute unconstitutional, and the case was appealed directly to the Illinois Supreme Court. In both of its decisions, the Illinois Supreme Court focused on the statute's criminalization of the recording of *any* conversation without consent (except in limited circumstances), regardless of whether the parties intended the conversation to be private, and assessed whether this burdened substantially more First Amendment speech than was necessary for the legislature to protect conversational privacy. The court held that it did. The court pointed to the fact that recording incidents, such as a loud argument on the street, a political debate on a college quad, or a loud conversation would all be illegal under the statute, even though none of those conversations implicate privacy interests. The court therefore declared the statute's recording provision unconstitutional. Based on this finding, the court in *Clark* also ruled that the statute's criminalization of the publication of a conversation recorded without consent was unconstitutional.

How *Melongo* and *Clark* Impact Employers

While the eavesdropping statute's prohibition of unconsented audio recordings has long been a thorn in the side of employers that operate call centers or customer help lines—or even employers that want to implement training programs that involve recording employees, such as mystery shopper programs—the statute served (if unwittingly) as a shield for other employers. This was because even employers without policies prohibiting the recording of workplace conversations could still fall back on the eavesdropping statute as a means of guarding against unauthorized recordings of workplace conversations. Not so anymore. The invalidation of the statute permits employees—who are not otherwise subject to a workplace policy prohibiting them from recording conversations—to record, essentially, any workplace conversation *and* to distribute those recordings. This could lead to employers being forced to deal with employees posting recordings of confidential internal meetings or online discussions, employees looking to build cases against their employers by recording conversations with supervisors and colleagues for later use in discrimination or harassment lawsuits, as well as employees simply eavesdropping on one another.

With that said, employers that have not implemented workplace policies prohibiting recorded conversations now have more latitude to determine whether they want to record their employees' conversations at work, or their employees' interactions with customers or clients. Employers must be careful when making this decision, and consider whether recording employees' conversations might invite privacy infringement issues. For some employers, this risk may outweigh the potential benefit of being able to record employees' interactions. If an employer does decide to adopt a policy prohibiting the unconsented recording of conversations—or even shore up an existing policy—the policy must be carefully drafted. Employers should clearly state the business reasons motivating the policy. Employers should also make the policy applicable to all employees rather than creating exemptions for certain categories of employees. Employers with unionized workplaces should also consider whether the policy's language could be construed as infringing employees' rights under Section 7 of the National Labor Relations Act. Although we are unaware of any cases extending

Section 7 protection to conversations recorded by an employee in the workplace, an employer will be well-served to draft a policy that lays out its legitimate business reasons for banning recordings in the workplace and that makes clear that the policy is not targeting any Section 7 activities.

This article was authored by an attorney in the Chicago office of Ogletree Deakins.

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