

ALERTS**Labor & Employment Law Alert - Illinois Supreme Court Finds Eavesdropping Law Unconstitutional**

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The Illinois Supreme Court recently held that the long standing rule in Illinois which requires all parties to consent to the recording of a conversation is an overly broad infringement of free speech rights and is unconstitutional, *People v. Clark*, 2014 IL 115776 (March 20, 2014) and *People v. Melongo*, 2014 IL 114852 (March 20, 2014). The Illinois Supreme Court's ruling will leave it up to the Illinois legislature to draw a more precise line between the protection of an individual's privacy and the protection of free speech rights. Although both rulings were criminal cases, these rulings impact Illinois employers.

Until these decisions and absent and applicable exception (such as the telemarketing exception), Illinois was a "two-party consent state" which prohibited the audio recording of any conversation unless all parties to the conversation consented to the recording. In *Clark* and *Melongo*, the Illinois Supreme Court determined that Section 14-2(a)(1) of the Illinois eavesdropping statute is unconstitutional on its face because a substantial number of its applications violate the first amendment.

In reaching this determination, the Illinois Supreme Court noted that the statute criminalizes the recording of all conversations, including those that "cannot be deemed private," including a loud argument on the street, a political debate in a park, yelling fans at an athletic event, the public interactions of police officers with citizens or any other conversation loud enough that the speakers should expect to be heard by others. Based on these factors, the Illinois Supreme Court determined the recording provision burdens substantially more speech than is necessary to serve the interests of the statute and is therefore overbroad. The Illinois Supreme Court also held the defendant could not be constitutionally prosecuted for divulging the contents of the conversation she recorded if she could not be constitutionally prosecuted for recording the conversation in the first place.

Prior to these decisions, Illinois employers did not need a rule prohibiting recording conversations in the workplace because the Illinois eavesdropping statute protected employees from surreptitious recordings. That protection is now gone. From a management standpoint, there can be strong business justifications for a ban on recording or videotaping in the workplace. For example, non-consensual recording or videotaping of conversations can have a disruptive effect on workplace morale and productivity. Employees may now think these new rulings permit them to use cell phones or other hidden recording equipment to secretly tape conversations with managers or co-workers.

Employers with operations in Illinois should strongly consider drafting policies that prohibit recording conversations. If you have such policies in

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place, you should review them to ensure that they are appropriate in light of these new decisions. Finally, it would be prudent to remind your employees they are prohibited from making such recordings in connection with their work.

Illinois v. Clark can be [found here](#). *Illinois v. Melongo* can be [found here](#).

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