

CLIENT ALERT

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Telephone Taping in the Workplace

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Telephone Taping and Electronic Surveillance. It sounds simple, the rule – both federal and state – is that eavesdropping is illegal and both oral and telephone communications cannot be surreptitiously recorded without court authorization. Indeed the stated purpose of the Federal Omnibus Crime Control and Safe Streets Act of 1968 (the “Act”) is to prohibit all interceptions of oral and wire communications – including telephone communications – except as provided in the Act. However, as with many other rules, there are exceptions to the rule – exceptions which differ from state to state. For the business community, the two important exceptions to the general prohibition against the interception and recording of oral and telephonic communications are the single party consent exception and the so-called business extension exception.

The Single Party Consent Exception. The most well known, and broadest, exception to the general rule is that under federal law a party to a telephone call – or someone else authorized by that person – may intercept and record a conversation when one of the parties to the conversation has given prior consent to the interception, so long as it is not done for the purpose of committing a criminal or tortious act. This is usually referred to as the single party consent exception.

Most states, including Rhode Island, follow the federal model and are therefore referred to as “single party consent states.” However, even in Rhode Island, the authority to record a conversation is not without limits. It may not be done for a criminal or tortious purpose. In *State v. O’Brien*, a student at the University of Rhode Island hid in the closet of a fraternity house and surreptitiously videotaped his fraternity brother

having sex with a young woman. Although the frat brother knew about the scheme and had agreed to it, the young woman had not. The woman soon realized that her privacy had been violated. The court ruled that although at that time there was no statute prohibiting the video portion of the videotape – only half of the states have statutes which prohibit hidden cameras – there was a prohibition against audio recording. The invasion of this woman’s privacy constituted a tortious purpose sufficient to negate the single party consent exception.

All Party Consent States. Approximately a dozen states, including Florida, California, and Massachusetts, have taken a more protective stance than Rhode Island and the federal government in favor of greater personal privacy and these states generally require that all parties to the conversation consent to the taping. As a result, it is possible for someone to follow the federal single party consent statute and still violate a state law!

Which Law Applies? Generally, the law of the jurisdiction in which the recording device is located is considered to be controlling. This makes some sense because the violation does not necessarily relate to where the words are spoken but, rather, where they are recorded. At least two Massachusetts courts have agreed with this analysis but it should be noted courts in some other jurisdictions have analyzed this issue differently, looking to the intent of the legislature in enacting the legislation.

The Business Extension Exception. The other significant exception to the prohibition against the tape recording of telephone conversations is known as the business extension exception. This exception

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recognizes that in certain businesses the recording and monitoring of telephone conversations is absolutely necessary and should be allowed when done in the ordinary course of business but not if done merely as a pretext to spy on particular employees.

Under the business extension exception, if the recording of an oral communication is (1) made with interception equipment furnished to the employer by a communication services provider, and (2) made within the ordinary course of business, there is a no "interception" as defined by the statute.

The "exempt" equipment contemplated by this exception has been interpreted to be something other than ordinary consumer recording devices purchased by the employer solely for the purpose of recording the conversations of its employees. For example, in *Dillon v. MBTA*, the Massachusetts Supreme Judicial Court found no violation of the statute where the Massachusetts Bay Transit Authority purchased several large recording machines for the recording of all incoming and outgoing calls for "routine business" and where the machines were "directly integrated" into the phone lines on which they depended in order to function. Significantly, these were not makeshift "Radio Shack" devices, jury-rigged to telephone lines by curious employers interested in spying on employees. The court approved the business considerations of efficiency, safety and sound maintenance record-keeping as well as a "sound business interest" of the MBTA in monitoring the quality of telephone calls from its telemarketers to customers. The court equated the term "ordinary course of business" with legitimate business purpose. The fact that some of the calls which were intercepted were "personal" in nature, was an "unavoidable byproduct or consequence of the necessarily continuous recording." Systems which are less systemic, more factually remote and impromptu have been uniformly rejected by the courts as not contemplated by this

exception.

Courts which have considered the business extension exception have generally held that where an employer has a legitimate business interest to justify and monitor employees' phone calls, the employer may intercept calls made or received in the ordinary course of business by its employees using one of its phone extensions. Most of the cases which have considered the business extension exception have been decided on the questions of whether or not the employee who was tape-recorded had been given either actual or implied notice and whether or not the recording was made in the ordinary course of business?

The business extension exception does not allow for the recording and monitoring of personal calls because they are not being recorded in the "ordinary course of business." As one court has held the right to privacy is paramount, interception of a personal call is never allowed under the business extension exception unless it is solely to guard against unauthorized calls or to determine whether a call is personal or business. The monitoring of personal calls must be scrupulously minimized. As stated by one court "A personal call may be intercepted in the ordinary course of business to determine its nature but never its content." For any business thinking about monitoring/recording the telephone calls of its employees, it is clearly the best practice if the employee is not only on notice that calls might be monitored but that such notice be acknowledged in writing with a signed consent authorizing the recording. Because of these issues, it is important for employers to seek legal counsel before they embark on any recording or monitoring of their employee's telephone calls or other electronic communications.

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