

OBJECTIVE MEMORANDUM

TO: Mark Brown, Esquire

FROM: Florida Legal Research
Andrea Stokes, Research Attorney

RE: FL/Business Planning/Trade Regulation/Rules and Regulations Applicable
To Employer Phone-Monitoring Service

DATE: May 6, 2008

STATEMENT OF FACTS

The client wants to start a business here in the United States that would provide quality control monitoring of employees' work-related telephone conversations and tape-record those conversations. All recorded conversations would be between the client, or one of his employees or agents, and an employee of the business or entity which has retained the client's monitoring services. An employee, agent, or representative of the phone monitoring service proposed by the client (hereinafter referred to as the □ Company □) would place calls to the subject business or entity that hired the Company, posing as a patron or customer. Those calls would be recorded by the Company, presumably through devices on or attached to the Company's phones. The recorded conversations would be made available to the subject business or entity at their request for training and/or quality control purposes. All employees would be notified in advance that some calls may be monitored for training and/or quality control purposes and would have signed consent-to-monitoring forms on file with the employer prior to the Company's contact with employees of the subject business or entity. Presumably, outgoing calls, personal phone calls, or incoming calls to the subject business or entity other than those made by the Company would not be monitored by the Company.

QUESTIONS PRESENTED

1. May employers cause their employees' work-related telephone calls to be monitored and recorded?

Conclusion

The federal Electronic Communications Privacy Act of 1986 ("ECPA"), codified in 18 U.S.C. §§ 2510 et seq., provides the parameters under which telephone calls may be monitored or intercepted. While the overall purpose of the relevant sections is to prohibit the interception of telecommunications, there are several express exceptions under which one may lawfully intercept a communication so long as it would serve no criminal or tortious purpose. One of these exceptions allows employers to monitor employees' work-related telephone calls, again provided there is a legitimate business purpose for the interception or monitoring (such as quality control), the monitoring policy is applied consistently by the employer, and the employees were made aware of the employer's right and/or intention to monitor. Note, however, that the so-called "business extension exception" discusses the use of any equipment or device furnished to a subscriber (here, the employer) by the provider of communication service "in the ordinary course of business." However, a different subsection allows for interception of communications by a person who is a party to the communication or where one of the parties to the communication has consented to the interception, again provided no criminal or tortious purpose exists. Depending on the state in which the phone calls take place, state statutes, such as those in Florida, may be more restrictive. Florida law requires that all parties to the communication be made aware that the communication may be monitored and consent be provided prior to said monitoring. Almost a dozen other states impose similar restrictions. Additionally, if labor unions are involved, it is important to note that the National Labor Relations Act (NLRA) prohibits any surveillance of protected (concerted) union activities whatsoever. For other intended surveillance, employers should be aware

that it may be subject to negotiation with the union involved. With those caveats, though, employers can lawfully monitor the work-related telecommunications of their employees.

2. May a monitoring service company such as that being offered by the client lawfully record its own telephone conversations with employees of the businesses or entities that hire such a company?

Conclusion

Federal legislation again provides the baseline parameters and prohibitions for recording telephone communications. As long as the party doing the recording is a party to the communication being recorded and has no criminal or tortious intent, federal statutes allow it. Florida state statutes, however, require that all parties to any recorded conversation consent, not just one. Central to any analysis of the propriety of recording one's telephone conversations with another, then, is the purpose behind making such a recording and whether the other party or parties know and consent to the possibility of being recorded. Following both the federal and state mandates, provided the recordings are made and used only for legitimate business purposes, like quality control, training, and supervision, and the employees have prior notice that calls may be monitored or recorded and consent to that practice, in general a monitoring service such as the Company proposed by the client may lawfully record the telephone conversations it initiates with employees of the subject businesses or entities who have retained such a company to monitor and record said conversations.

DISCUSSION OF AUTHORITY

I. Assuming Certain Requirements And Conditions Are Met, Employers May Lawfully Monitor And Record Employees' Work-Related Telephone Calls.

The federal Electronic Communications Privacy Act ("ECPA") of 1986, codified as 18 U.S.C. §§ 2510 et seq. (2007), clearly and specifically delineates the situations wherein communications may and may not be monitored and/or intercepted. Florida Statutes, section 934.02(4)(a) (2007), which tracks the language of 18 U.S.C. § 2510(5) (a), and section 934.03(2)(d) (2007), which is more restrictive than its federal counterpart, also control in Florida. The pertinent sections are as follows:

Title 18 U.S.C. § 2510(5)(a) states:

(5) ☐ electronic, mechanical, or other device ☐ means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

Title 18 U.S.C. § 2511(2)(d) states:

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

Florida Statutes, section 934.02(4)(a)(1), states:

(4) ☐ Electronic, mechanical, or other device ☐ means any device or

apparatus which can be used to intercept a wire, electronic, or oral communication other than:

(a) Any telephone or telegraph instrument, equipment, or facility, or any component thereof:

1. Furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business.

Florida Statutes, section 934.03(2)(d), states:

(d) It is lawful under §§ 934.03-934.09 for a person to intercept a wire, oral, or electronic communication when all of the parties to the communication have given prior consent to such interception.

The exception described in both 18 U.S.C. § 2510(5)(a)(i) and Florida Statutes, section 934.02(4)(a)(1), allows the interception of electronic communications by a subscriber or user of telephone service with equipment furnished to said subscriber or user by the provider of the telephone service, as long as the service, and thereby the interception, is "used in the ordinary course of ... business." Also known as the "extension phone exception" or the "business extension exception," federal courts have consistently held that as long as the equipment that intercepts the call or communication falls within the definition of "telephone or telegraph instrument, equipment or facility, or any component thereof," such as a standard extension telephone like those generally found in most businesses, the exception applies. *See Watkins v. L.M. Berry & Co.*, 704 F.2d 577, 581 (11th Cir. 1983) (citing *Briggs v. Am. Air Filter Co.*, 630 F.2d 414, 417 (5th Cir. 1980)). Applying predominantly in workplace situations, this exception operates without regard to consent of the employees who are parties to the monitored or

intercepted communications as "long as the requisite business connection is demonstrated." *Id.* Federal courts have long interpreted the 'intercepting device' to mean the telephone receiver, and distinguished the mechanism recording the intercepted communication as a separate mechanical entity. *See Epps v. St. Mary's Hosp. of Athens, Inc.*, 802 F.2d 412, 415 (11th Cir. 1986); *Royal Health Care Servs. v. Jefferson-Pilot Life Ins. Co.*, 924 F.2d 215, 218 (11th Cir. 1991). Referring to both other Eleventh Circuit decisions interpreting the federal wiretap statutes as well as decisions of the Florida Supreme Court interpreting state wiretap statutes, the court in *Royal Health Care* determined conclusively that the telephone extension, not the recorder, intercepts the call or conversations. *See* 924 F.2d at 218. This is key, as the employers who hire the client's Company would purportedly intend that the Company record its own communications with employees of the business that retains the Company. Had the courts held that recording and intercepting were one and the same, this would likely run afoul of the "business extension exception," as the recording equipment would not have been supplied by the telecommunication service provider. However, since the communications will take place, at least in part, with the employers' telephone equipment and the various telephone extensions necessary to operate a business, this first prong of the "business extension exception" is met. *Id.*

Once the equipment question is settled, the question then becomes whether the employer's monitoring of the employees' phone calls and conversations was "in the ordinary course of . . . business." *Id.* The singular purpose here behind monitoring the work-related telephone communications of various businesses' employees is to assess quality and customer service, and to provide information that could improve efficiency,

training, and customer relations. Clearly, this is directly and concretely within the ordinary course of business. No personal calls may be monitored, and, in fact, only calls made to the subject businesses (upon their hiring of the client's firm) would be monitored and for the sole express purpose of engaging employees in a work-related communication and assessing their conduct while dealing with someone whom they believe to be a customer of their employer. Precautions should be taken to remove any dangers whatsoever that employees' personal communications might be monitored, intercepted, or recorded. This might be accomplished by requiring employees to use an entirely separate or dedicated phone line for their personal calls. As long as care is given to end any monitoring or intercepting activity once it becomes clear that the call is not work-related, it is not violative of the Security of Communications statutes. *See Deal v. Spears*, 780 F. Supp. 618, 622 (W.D. Ark. 1991).

The exception set forth in 18 U.S.C. § 2511(2)(d) and Florida Statutes, section 934.03(2)(d), is known as the "consent exemption." Under the federal statute, as long as the intercepting or recording is done by a party to the communication, or as long as one of the parties to the communication has consented prior to the interception, the interception is deemed lawful. The only caveat is that there can be no criminal or tortious intent behind the interception. *See* 18 U.S.C. § 2511(2)(d). The Florida statute is more restrictive and requires simply that all parties to the communication consent prior to the interception. *See* § 934.03(2)(d), Fla. Stat. Almost a dozen other states have similarly restrictive statutes, so it is important to keep in mind that the "interception occurs . . . where the words or the communication is uttered, not where it is recorded or heard." *Cohen Bros. v. ME Corp.*, 872 So. 2d 321, 323 (Fla. 3d DCA 2004). Of course, as the

Cohen Bros. court explained, citing *Jatar v. Lamaletto*, 758 So. 2d 1167 (Fla. 3d DCA 2000), the question of whether a party consented prior to the interception of their communication actually arises only "if there is a reasonable expectation of privacy which is recognized by society." 872 So. 2d at 324 (court's emphasis). "[T]he legislature did not intend that every oral communication be free from interception without the prior consent of all parties to the communication." *Jatar*, 758 So. 2d at 1168 (citing *State v. Inciarrano*, 473 So. 2d 1272, 1275 (Fla. 1985)).

The first question, then, is whether the alleged aggrieved party had a reasonable expectation of privacy at the time the interception occurred. Clearly, there is no "absolute right of privacy in a party's office or place of business." *Cohen Bros.*, 872 So. 2d at 324. So the question of expectation of privacy actually has two parts: (1) whether the party exhibits an expectation of privacy, and (2) whether that expectation would be accepted by society, and, therefore, the court, as reasonable. If either of those parts is answered in the negative, then no expectation of privacy exists, and the communication is not protected by the Security of Communications Act. Consent, or lack thereof, is no longer relevant. However, when, as here, an employer intends to monitor and/or record employees' work-related telephone conversations, there can be no harm in first securing their express consent to such interceptions through stated company policies and standards.

Finally, if the employees to be monitored are part of organized labor unions, the National Labor Relations Act (the "NLRA") also bears on the question. Note, in particular, 29 U.S.C. §§ 157, 158(a)(1), which provide respectively, in pertinent part, that "employees . . . have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other . . . protection," and that "it shall be an unfair labor practice

for an employer to interfere with, restrain, or coerce employees in the exercise of rights guaranteed under section 157.□ Thus, the NLRA prohibits any surveillance of protected "concerted" union activities whatsoever. The test is whether the surveillance "reasonably tends to interfere with, restrain or coerce the employees" or, alternatively, whether the surveillance is directed towards union activities or tends to create the impression that it is. Surveillance of non-union activities is permissible. *See NLRB v. Intertherm, Inc.*, 596 F.2d 267 (8th Cir. 1979); *Hedstrom Co. v. NLRB*, 558 F.2d 1137 (3d Cir. 1977); *Belcher Towing Co. v. NLRB*, 726 F.2d 705 (11th Cir. 1984); *NLRB v. Southwire Co.*, 429 F.2d 1050 (5th Cir. 1970); *NLRB v. ProMedica Health Sys.*, 2006 FED App. 0737N, 206 F. App'x 405 (6th Cir.), *cert. denied*, 127 S. Ct. 2033 (U.S. Apr 16, 2007). Accordingly, an employer must ensure that no such union-related communications are part of the monitoring protocol. For other intended surveillance, employers should be aware that the union contract for those employees may require that any monitoring or interception, even on business premises and other than "concerted activities," is subject to negotiation with the union involved.

II. Assuming Certain Requirements And Conditions Are Met, A Monitoring Service Company Such As That Proposed By The Client May Record Its Own Telephone Conversations With Employees Of The Businesses Or Entities That Hire Such Service To Monitor For Quality Control.

As with the analysis above, the controlling laws are the federal ECPA, 18 U.S.C. §§ 2510 et seq., and the Florida Security of Communications Act, as codified in Florida Statutes, section 934.02(4)(a), which tracks the language of 18 U.S.C. § 2510(5)(a), and section 934.03(2)(d), which is more restrictive than its federal counterpart, 18 U.S.C. §

2511(2)(d). (The text of the pertinent sections is quoted in full in Part I, pages 4-5.)

Again, under both federal and state law, the two applicable exceptions concern whether the communication was on equipment used in the ordinary course of business and concerned ordinary business-related matters, and whether the party whose communication was intercepted consented prior to the interception.

As to the first exception, the Company providing the monitoring service will undoubtedly be communicating with the employees of the businesses that retain said Company via their business phone extensions on their business premises. So the question that must be answered is whether the Company providing the monitoring service, using its own business telephone service and presumably some sort of tape-recording device (unknown at this point whether provided by the phone company), can record its own conversations with employees engaged in the performance of their duties while using their employers' business phone extensions. Based on the foregoing discussion of applicable federal and state law, this analysis has several prongs. First, if the Company providing the monitoring service asserts that no unlawful interception would occur based on the "business extension exception," since courts have held that the "interception" occurs not where the communication is heard or recorded, but rather where it is spoken, the evaluation of whether the equipment fits the "business extension exception" standard would look to the employers' telephone equipment, not that of the monitoring firm. *See Watkins*, 704 F.2d at 581 (citing *Briggs*, 630 F.2d at 417); *Royal Health Care*, 924 F.2d at 218; *Epps*, 802 F.2d 412. The court in *Epps*, citing *United States v. Harpel*, 493 F.2d 346, 350 (10th Cir. 1974), noted further that even when the recording is made through a tape recorder that receives input from a suction cup attached to the recording party's telephone

receiver, it is the receiver that is the intercepting mechanism, not the recorder. 802 F.2d at 414. As the *Royal Health Care* court summarized, "the tape recorder recorded" the conversation. 924 F.2d at 218 (citing *State v. Nova*, 361 So. 2d 411 (Fla. 1978)). Following the consistent premise underlying those decisions, the scenario apparently envisioned by the client passes the first prong of the exception. The next prong is whether the interception occurs in the ordinary course of business and whether the conversation is one of a business nature, not personal. Here, the Company providing the monitoring service would be contacting employees of the businesses that retain the Company via their business telephones during their business hours. Through the Company's contact with them, the employees would believe the representative or agent of the Company to be a patron or customer of the business where they are employed. Surely there can be no question that such contacts and communications would fall squarely within "the ordinary course of business," thereby satisfying the "business extension exception."

There are some decisions from federal courts presiding outside of our area, though, that interpret this exception more narrowly. Some decisions refuse to apply the exception where employers installed or used tape recorders to intercept employees' telephone conversations, holding that "tape recorders . . . were not telephone instruments or equipment for purposes of the . . . exception," that they do not in any way "relate to the facilitation of communication," see *Pascale v. Carolina Freight Carriers Corp.*, 898 F. Supp. 276 (D.N.J. 1995); *Schmerling v. Injured Workers' Ins. Fund*, 795 A. 2d 715 (Md. 2002), or that recorders do not fall within the definition of "electronic device" needed for the exception to apply, see *Sanders v. Robert Bosch Corp.*, 38 F.3d 736 (4th Cir. 1994).

And despite the rather clear language of the ECPA, still other courts have held that the "ordinary course of business" exception would not apply where telephone conversations were surreptitiously recorded and the employees had not expressly consented. *See George v. Carusone*, 849 F. Supp. 159 (D. Conn. 1994); *James v. Newspaper Agency Corp.*, 591 F.2d 579 (10th Cir. 1979). The majority of federal case law, though, does not hold to such a stringent interpretation of the ECPA.

Should the client wish to proceed under the "consent exemption," and be communicating with employees in the State of Florida, the more restrictive "all parties consent" mandate must be followed. There is no doubt that the Company being proposed by the client would meet the federal standard, requiring either that the recording person be a party to the conversation or that at least one party consents. 18 U.S.C. § 2511(2)(d). The Florida rule, though, requires that all parties to the communication must consent prior to the interception. *See* § 934.03(2)(d), Fla. Stat. But key to this analysis is whether the alleged aggrieved party had a legitimate and reasonable expectation of privacy as to the intercepted/recorded communication. *See Cohen Bros.*, 872 So. 2d at 323; *Jatar*, 758 So. 2d at 1169 (citing *Inciarrano*, 473 So. 2d at 1275). Those decisions make it clear that reasonable expectations of privacy do not necessarily extend to conversations conducted in a business setting. *See Jatar*, 758 So. 2d at 1169. Beyond that, even if the alleged aggrieved party exhibits an expectation of privacy, if the circumstances do not reasonably justify such an expectation, then the statute does not protect those communications. *See Inciarrano*, 473 So. 2d at 1275. Given that employees on their employers' premises, using their employers' equipment, conducting their employers' business, during times when said employees are supposed to be working (as opposed to lunch hours, etc.),

would be hard-pressed to support an argument that they had a reasonably justified expectation of privacy as to conversations and communications that occurred as a corollary of said business's operation. Nonetheless, a more prudent course would be for the Company providing the monitoring service to ensure that the employers make their employees expressly aware in advance that their business telephone calls may be monitored for quality control purposes and perhaps have those employees sign "consent to monitor" forms.

Finally, as discussed in the section above, any surveillance or impression of surveillance of employees engaged in protected union activities is strictly prohibited by the NLRA. *See* 29 U.S.C. §§ 157, 158(a)(1). The proposed monitoring company would be acting as an agent of whatever employers retain said Company to monitor their employees' work-related telephone communications. In situations where the monitored employees were union workers, the agency relationship between the Company providing the monitoring service and the businesses that retain said Company would extend the applicability of the NLRA to the monitoring company's activities on the employer's behalf. Undercover agents hired by an employer to conduct surveillance on union employees could be reasonably interpreted as conducting "unlawful union surveillance" where the information provided to the employer by said agents results in the employer's knowledge of union activities. *Southwire Co.*, 429 F.2d 1050. So, again, it is essential that the client be aware of these restrictions and establish operational protocols that fit within them. If the client's Company monitors, intercepts, and records only genuine business-related telephone communications that the employees would normally handle in the regular scope of their duties for their employer, it should remain free of NLRA

entanglements.

RESEARCHER'S NOTE

The federal decisions from the Sixth Circuit are those most likely to disagree with the other circuits. The KeyCites for all the cases showed them as good law, but depending on the circuit in which the case was heard, the court either followed that body of case law or distinguished those decisions and/or declined to follow them. However, none was overturned and none was distinguished other than from a factual perspective within the same circuit.