

Doing Business in Illinois or with Illinois Companies? Beware the Illinois Eavesdropping Statute!

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Introduction

The Illinois Eavesdropping Statute (720 ILCS 5/Art. 14) has long been known as one of the nation's strictest statutes criminalizing eavesdropping. In 2014, in response to decisions of the Illinois Supreme Court adjudicating its core provisions unconstitutional, the Illinois legislature amended the statute. The new statute took effect in 2015 and is notable in several respects: for amendments that broaden its scope; its ponderous and lengthy text; the subjectivity of its definitions; its restrictions on law enforcement personnel and common carriers; and the several exemptions to liability.

In today's age, people and enterprises often routinely record personal and business communications for a variety of valid reasons. However, care should be taken not to run afoul of the strictures of the Illinois Eavesdropping Statute as the statute poses a very real specter of criminal and civil liability, both of which can be imposed on direct violators or vicariously on those hiring or assisting eavesdroppers. This article highlights some of the more notable features of the statute that an ordinary person or business might encounter.



1. The statute is a criminal statute.

One reason in particular to be aware of the eavesdropping statute is because it makes eavesdropping a crime. Section 14-4 of the statute provides that a first offense of eavesdropping is a Class 4 felony. A second or subsequent offense is a Class 3 felony. In the case involving eavesdropping on any law enforcement officer, any state's attorney, the attorney general, assistant attorney general, or a judge, while in the performance of official duties, the violation is a Class 3 felony, and for a second or subsequent offense, is a Class 2 felony.

2. The statute provides for civil liability.

Section 14-6 provides for civil remedies to a party that is the victim of eavesdropping. These remedies include an injunction prohibiting further eavesdropping, actual damages and punitive damages.

3. What it takes to violate the Illinois Eavesdropping Statute.

Under the statute, an eavesdropper is any person, including any law enforcement officer and any party to a private conversation, who operates or participates in the operation of any eavesdropping device contrary to the statute's provisions.

A person commits eavesdropping when he or she knowingly and intentionally:

(1) Uses an eavesdropping device, in a surreptitious manner, for the purpose of overhearing, transmitting, or recording all or any part of any private conversation to which he or she is not a party unless he or she does so with the consent of all of the parties to the private conversation; or

(2) Uses an eavesdropping device, in a surreptitious manner, for the purpose of transmitting or recording all or any part of any private conversation to which he or she is a party unless he or she does so with the consent of all other parties to the private conversation.

4. In order to violate the statute with respect to oral conversations one must use an "eavesdropping device" in a "surreptitious manner."

Note that in order to violate the statute one must employ an eavesdropping device. Section 14-1(a) of the statute defines an "eavesdropping device" as any device capable of being used to:

1. hear or record oral conversation or;
2. intercept, or transcribe electronic communications

whether such conversation or electronic communication is conducted in person, by telephone, or by any other means. Hearing aids are excluded from the definition of "eavesdropping device."

"Surreptitious" means obtained or made by stealth or deception, or executed through secrecy or concealment.

5. When is recording a conversation permissible?

Note also that the statute only protects *private conversations*. However, the statute defines "private conversation" as any oral communication between 2 or more persons, whether in person or transmitted between the parties by wire or other means, *when one or more of the parties intended the communication to be of a private nature under circumstances reasonably justifying that expectation*. The subjective nature of this definition hinges on the intent of one of the parties to the conversation. This subjectivity is made even more open-ended and unclear by virtue of the statute indicating that a "reasonable expectation" shall include 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.

The take away point from this text is that in Illinois in order to record a call without violating the statute, one must either have the consent of all parties or not do it in a surreptitious manner.

6. The statute also protects electronic communications.

A person also commits eavesdropping if he or she intercepts, records, or transcribes, in a surreptitious manner, any private electronic communication to which he or she is not a party unless he or she does so with the consent of all parties to the private electronic communication.

A "private electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or part by a wire, radio, pager, computer, electromagnetic, photo electronic or photo optical system, *when the sending or receiving party intends the electronic communication to be private under circumstances reasonably justifying that expectation*. Electronic communication does not include any communication from a tracking device.

7. Persons hiring eavesdroppers or aiding eavesdroppers can be held liable.

Included in the definition of "eavesdropper" is any person who acts as a "principal." A principal is any person who:

(1) Knowingly employs another who illegally uses an eavesdropping device in the course of such employment; or

(2) Knowingly derives any benefit or information from the illegal use of an eavesdropping device by another; or

(3) Directs another to use an eavesdropping device illegally on his or her behalf.

Thus, a principal can be held criminally liable for eavesdropping. Principals can also be held civilly liable to the same extent as the actual eavesdropper and be subject to an injunction, actual damages and punitive damages.

Additionally, any landlord, owner or building operator, or any common carrier by wire who aids, abets, or knowingly permits the eavesdropping concerned can also be held liable for actual and punitive damages.

8. Persons using ill-gotten information can be held liable.

A person also commits eavesdropping when he or she knowingly and intentionally uses or discloses any information which he or she knows or reasonably should know was obtained from a private conversation or private electronic communication in violation of this Article, unless he or she does so with the consent of all of the parties.

9. Notable exemptions to liability

Because of the statute's broadly restrictive language, there are provisions in the statute that had to be added to make clear that certain ordinary behaviors do not violate the statute.

For example, the statute indicates that the following are not violations of the statute:

- a. listening to radio, wireless electronic communications, and television communications of any sort where the same are *publicly* made;
- b. Any broadcast by radio, television or otherwise whether it be a broadcast or recorded for the purpose of later broadcasts of any function where the public is in attendance and the conversations are overheard incidental to the main purpose for which such broadcasts are then being made;
- c. Recording or listening with the aid of any device to any emergency communication made in the normal course of operations by any federal, state or local law enforcement agency or institutions dealing in emergency services, including, but not limited to, hospitals, clinics, ambulance services, fire fighting agencies, any public utility, emergency repair facility, civilian defense establishment or military installation;
- d. Recording the proceedings of any meeting required to be open by the Open Meetings Act, as amended;
- e. Recording or listening with the aid of any device to incoming telephone calls of phone lines publicly listed or advertised as consumer "hotlines" by manufacturers or retailers of food and drug products.

Importantly, the statute allows the recording of a conversation by or at the request of a person, not a law enforcement officer or agent of a law enforcement officer, who is a party to the conversation, *under reasonable suspicion* that another party to the conversation is committing, is about to commit, or has committed a criminal offense against the person or a member of his or her immediate household, and there is reason to believe that evidence of the criminal offense may be obtained by the recording.

The statute also provides that no claim shall lie against a parent, step-parent, guardian, or grandparent for eavesdropping of electronic communications through access to their minor's electronic accounts during that parent, step-parent, guardian, or grandparent's exercise of his or her parental rights to supervise, monitor, and control the activities of a minor in his or her care, custody, or control.

Lastly, the statute exempts, as long as certain rules are followed, from its prohibition on regarding conversations businesses that are engaged in the following legitimate business activities that use a live operator:

- (i) soliciting the sale of goods or services;
- (ii) receiving orders for the sale of goods or services;
- (iii) assisting in the use of goods or services; or
- (iv) engaging in the solicitation, administration, or collection of bank or retail credit accounts.

10. Making, selling and possessing devices that can be used for eavesdropping can violate the Illinois Eavesdropping Statute.

The statute states anyone who does the following commits eavesdropping: manufactures, assembles, distributes, or possesses any electronic, mechanical, eavesdropping, or other device knowing that or having reason to know that the design of the device renders it *primarily useful* for the purpose of the surreptitious overhearing, transmitting, or recording of private conversations or the interception, or transcription of private electronic communications and the intended or actual use of the device is contrary to the provisions of this Article. However, the statute qualifies this possible liability by providing that it is not unlawful to manufacture, assemble, sell, or possess an eavesdropping device within the normal course of their business for purposes not contrary to this Article or for law enforcement officers and employees of the Illinois Department of Corrections to manufacture, assemble, purchase, or possess an eavesdropping device in preparation for or within the course of their official duties.

11. The statute imposes a duty to report the discovery of an eavesdropping device..

Section 14-8 states that any individual, who discovers any physical evidence of an eavesdropping device being used which such person does not know to be a legal eavesdropping device shall, within a reasonable time after such discovery disclose the existence of such eavesdropping device to the State's Attorney of the county where such device was found. The State's Attorney shall within a reasonable time notify the person or persons apparently being eavesdropped upon of the existence of that device if the device is illegal. A violation of this Section is a Business Offense for which a fine shall be imposed not to exceed \$500.