

The Right to Listen in on Employees' Phone Calls and the Standardization of French Privacy Law

McDermott
Will & Emery

Article By

[Myrtille Lapuelle](#)

[McDermott Will & Emery](#)

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Since 2001, the **French Court of Cassation** has made a continuous effort to refine and, in some circumstances, narrow the scope of the right to privacy in the workplace with a view to reaching a fair and balanced approach. The January 6, 2015 declaration of the **French Data Protection Authority (CNIL)** further highlights this trend towards the standardization of information collection at work, and serves to *clarify and expand the right of employers to listen in on employees' phone calls at work.*

Background

In the landmark 2001 "Nikon Case," the Court of Cassation ruled that "an employee has the right to the respect of his private life - including the right to the secrecy of correspondence - on the work premises and during working hours." This announcement was qualified, however, and the court further refined that unless marked by the employee as "private," the documents and files created by an employee on a company-computer for work purposes are presumed to be professional, which means that the company can access those documents and files without the employee's presence. This can lead to an employer using such emails against an employee in the case of employment termination. Nonetheless, employers

have an obligation under privacy and labor laws to inform employees about the collection and use of their personal data.

Building off of this decision, in October 2014, the *French Social Supreme Court* held that evidence gathered against an employee from data that had not previously been declared to and registered with CNIL was *de facto* illegal.

The French Labor Code and the French Data Protection Act both stipulate rules for the use of monitoring software by employers in the event that an employer wishes to establish such mechanisms. In particular, the employer must submit information to and engage in consultation with the works council, provide information to employees impacted by the software and make a formal declaration of the proposed monitoring activities to CNIL.

CNIL Declaration: Movement Toward a Simplified Norm

Continuing this trend, the declaration issued by the CNIL on January 6, 2015, further demonstrates not only how important the CNIL is, but also how the area of data protection is evolving and become more standardized in France.

This recent declaration established that employers wishing to record their employee's telephone communications must first declare such information by filling out a *simplified* declaration form in lieu of a normal declaration form. After effectuating this simplified declaration, an employer will have the ability to listen to and record employee conversations for the purpose of employee training, evaluation and betterment of the quality of service.

While this declaration serves to grant employers permission to monitor employees, it also imposes upon them a number of restrictions: (i) the employee must be notified and informed of his or her right to refuse such recordings and (ii) the employee may only keep recordings for a period of six months. The information gathered from such recordings, however, may be kept for a reasonable period of time.

The issuance of this simplified norm for employee monitoring of phone calls at work may not greatly affect the practical daily lives of employers or employees, but it does speak volumes about the power that the CNIL retains to impact labor law. The CNIL's declaration creates a sort of exception to normal procedure. Most often, the adoption of a simplified norm corresponds with the daily needs of businesses and administrations as the CNIL deems fit. In deciding to isolate the procedure for employee monitoring and by reclassifying the declaration procedure, the CNIL is highlighting and reacting to just how deep the issue of data protection has permeated the world of labor law.

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