



Employment Law Alert

On June 17, 2010, the U.S. Supreme Court unanimously ruled that a public employer has the right to read text messages sent and received by its employees on employer-owned pagers. The decision is instructive for all employers - public and private - on managing employee expectations of privacy in their use of technologies owned or provided by the employer.

In City of Ontario v. Quon, a police officer sued the city, alleging that its review of his personal text messages violated his Fourth Amendment right against unreasonable searches, as well as the Stored Communications Act (U.S.C. §2701).

The Court held that, even assuming that the officer had a reasonable expectation of privacy in his texts, the search was constitutional "because it was motivated by a legitimate work-related purpose, and because it was not excessive in scope." The city audited the messages because Quon and other officers had been exceeding the monthly allotment of text messages under the city's plan with its provider, and therefore were incurring additional charges. The city reviewed employee texts to determine if the overages were due to work use or personal use of the pagers. If the audit showed that the texts were work-related, the city would consider changing the terms of its provider agreement. The audit revealed that Quon had been sending numerous personal texts, many of which were of a sexually explicit nature.

While the Court declined to rule on whether Quon had a reasonable expectation of privacy in his text messages, it hinted that one factor it would consider relevant to that inquiry would be whether the employer had a written policy on point. In this case, the city had issued a policy in which it "reserve[d] the right to monitor and log all network activity including e-mail and Internet use, with or without notice." The policy further stated that "Users should have no expectation of privacy or confidentiality when using these resources."

The crucial takeaway for all employers is that written policies on employee use of the employer's technology are essential. These policies must be up to date, and address all current technologies (including texts, instant messages, emails, blogs and social networking sites). The policies must inform employees that: (1) the technologies are owned by the employer; (2) employees should have no expectation of privacy in their use of the technologies - even when accessing personal email accounts; and, (3) the employer can (and does) monitor the employees' use of the systems. Employees should be required to sign documentation indicating that they have received, read, and understand the policy.

Why do employers need to protect their right to monitor employee emails, texts and internet use? Employees misuse employers' technology every day. As in the Quon case, employees inappropriately communicate, or "sext," using company-owned equipment. Employees also view offensive websites and circulate inappropriate emails. This activity can result in employer liability for harassment or discrimination. Employees also use company computers to steal confidential data, such as customer information or business plans. Employee abuse of these technologies costs employers, not only financial damages, but in loss of productivity and waste of resources.

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Further, when employers conduct searches, they must do so for legitimate work-related reasons, such as to investigate a claim that a worker is viewing pornography or to ensure that employees are using work time appropriately. The employees or consultants conducting the search must be trained in all employer policies, including those regarding confidentiality.

Kaufman Dolowich Voluck & Gonzo LLP is available to assist in the drafting and implementation of such policies. Please contact Michael Kaufman at mkaufman@kdvglaw.com <<mailto:mkaufman@kdvglaw.com>> or 516.681.1100; or John Gonzo at jgonzo@kdvglaw.com, if you have any questions or would like additional information.

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