

Employee E-mail/Text Privacy – Supreme Court Ruling

By James Hammerschmidt

Privacy issues have become a prevailing part of society today, from Google to Facebook to cameras that are everywhere and seem to monitor a person's every move. Some consider it Orwellian, while others regard the explosion of social media as a form of free-spirited expression. It's paradoxical to some degree. Yet for employers, less concerned with personal practices than professional policies, it can be downright confusing. The question confounding business owners is: *can I or can't I check an employee's text messages or email account without getting in trouble?*

Just last week, the Supreme Court reinforced an employer's right to review an employee's electronic text messages in *City of Ontario, California v. Quon*. The case involved a city police officer who had used his government-issued pager mostly for personal communications, even while on the job, and far exceeded the allotted character limit. After the police department received invoices charging it for excessive usage, it requested transcripts from the pager company and discovered the problem. It disciplined the officer, who then sued the city for violating his Fourth Amendment right to privacy. The Supreme Court determined that even if the officer had a reasonable expectation of privacy (a matter about which the Court expressly declined to rule) the police department's review of the officer's text messages was acceptable and reasonable.

While private employers do not need to concern themselves with the Fourth Amendment, courts have routinely held that private-sector employees do have some privacy rights. There also are federal and state laws relating to electronic communications (they're far too complex to delve into here) that may apply in the private workplace. However, as demonstrated in the *Quon* case, ALL employers can take a few simple steps to protect themselves and maintain the best possible position regarding workplace privacy matters:

- Have a written Electronic Communication Policy that applies to all types of electronic devices and software, such as landline and cell phones, computers, email, texts, software downloads and social media.
- Make sure the policy includes a clear, unequivocal statement that employees should have no expectation of privacy or confidentiality when using employer-issued equipment.
- Make sure the policy includes a clear, unequivocal statement that the company reserves the right to monitor and log all electronic activity.
- Require employees to sign the policy, including a written acknowledgment that they consent to monitoring and checking of electronic communications.
- Reiterate and reissue the policy on a frequent basis.

Workplace privacy issues are complex, and we recommend that employers consult with legal counsel when developing policies and engaging in any workplace monitoring. There is no doubt the city of Ontario benefited greatly from having a good policy in place. As the Supreme Court stated, "[e]mployer policies concerning communications will, of course, shape the reasonable expectations of their employees, **especially to the extent they are clearly communicated.**"