Employment Practices Group Alert:

Supreme Court Rules That Employer Search Of Employee Text Messages Did Not Violate Fourth Amendment

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In *City of Ontario v. Quon*, the United States Supreme Court held that a government employer's review of an employee's text messages sent and received on an employer-issued pager did not violate the employee's Fourth Amendment constitutional rights. Previously, in *Quon v. Arch Wireless* (reported in our July 2008 edition of the FEB here http://www.fenwick.com/publications/6.5.4.asp?mid=36), the Ninth Circuit Court of Appeals held that the employer City of Ontario's actions violated employee Quon's reasonable expectation of privacy and his Fourth Amendment right against unreasonable searches and seizures, primarily because a supervisor had assured Quon that his pager use would not be audited so long as Quon paid for any text overages.

Quon was a police sergeant with the City of Ontario. Through an express policy, Ontario reserved the right to monitor employee e-mail and Internet use. The City distributed pagers to Quon and other officers, and informed them verbally and in writing that pager texts were "considered e-mail and could be audited." However, Quon's supervisor subsequently informed Quon that the city would not audit his text messages so long as Quon reimbursed the City for overages. After Quon and another officer repeatedly exceeded their allotted text message quotas, the City decided to determine if the quotas were too low (*i.e.*, if officers were paying fees for work-related messages) or if the overages related to personal texts. The City audited Quon's text messages sent and received during work hours over a month-long period and discovered that most texts were personal and not work-related, and several were sexually explicit. The City determined that Quon violated company policy and disciplined him. Quon then sued the City for alleged violation of his Fourth Amendment right of privacy.

The Supreme Court determined that the City acted lawfully. The Court first declined to resolve the issue of whether Quon had a reasonable expectation of privacy in his texts. Rather, the Court assumed that Quon had such a reasonable expectation, but nevertheless held that the City's search was reasonable. Specifically, the Court found that the City had a legitimate, work-related rationale for the search – *i.e.*, to ensure that employees were not being unnecessarily charged for work-related texts, and that the City was not paying for personal texts – and the search was limited and not overly intrusive.

While the opinion primarily addresses legal standards applicable exclusively to government employers (*i.e.*, the constitutional right to be free from unreasonable government searches and seizures), it also provides meaningful insight for employers in the private sector, where common law rights of privacy can exist. The Court noted that resolving the right of privacy issue would require a determination of whether the supervisor's oral assurance superseded the City's express written policy. The Court also acknowledged that there were colorable arguments both in favor of and against finding an expectation of privacy under these circumstances. However, the Court was reluctant to establish definitive guiding principles on this point before the role of "emerging technology . . . in society has become clear."

The *Quon* opinion answers some but not all of the questions raised by this unique legal dispute. Regardless, it serves as a reminder to all employers to carefully review their personnel policies to ensure that they convey a clear message that employees should have no expectation of privacy in their use of company communication systems, and to also ensure that managers are properly trained to avoid statements and practices that contravene company policy.

For more information on these or related matters, please contact Daniel J. McCoy or Dan Ko Obuhanych.

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