ALERTS AND UPDATES

Supreme Court Concludes Employer Had Legitimate Interest in Reviewing Employee's Text Messaging

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In an opinion released June 17, 2010, the U.S. Supreme Court concluded—in *City of Ontario, Cal. v. Quon*[1]—that a governmental employer had a legitimate interest in reviewing the text messages that an employee sent during working hours from his employer-provided pager, and that the employer's review of such messages did not violate the employee's Fourth Amendment rights.

Jeff Quon was a police sergeant employed by the City of Ontario, California (the "City"). The City issued to Quon and others alphanumeric pagers that were capable of sending and receiving text messages. The wireless-service plan provided that each pager was allotted a specific number of characters sent or received each month. Usage in excess of the plan limits would result in an additional fee.

Before receiving his pager, Quon signed agreement to the City's "Computer Usage, Internet and E-Mail Policy." That policy stated that the City reserved the right to monitor and log all network activity including email 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." Although the policy's wording did not expressly cover text messaging, Quon and others with pagers were informed that messages sent on the pagers would be considered email messages and would fall under the City's policy.[2]

Almost immediately, Quon exceeded the monthly character limit for his pager and continued to do so regularly. The Ontario police officer responsible for the pager usage plan reminded Quon that the pager messages were considered email and could be audited. It was suggested that Quon reimburse the City for his overages, and he did so each time he exceeded his character allotment. Several other officers with pagers also exceeded their limits, and they too reimbursed the City. Eventually, the chief of police determined that he would commission a review of police officers' pager usage to determine whether the character limit was too low and whether officers were having to pay the City for work-related messages that caused them to exceed their limits.

The City contacted its wireless provider, Arch Wireless, Inc., and obtained the transcripts of the messages Quon had sent from or received on his pager. Many of the messages were not work-related and were sexually explicit. An internal investigation of Quon’s activities was launched. Before referring the matter to the police department's internal affairs division, any messages Quon sent or received while off-duty were eliminated or redacted from the transcripts. The internal affairs division reviewed the messages Quon sent during work hours. The vast majority of text messages sent by Quon during working hours were not work-related. Internal affairs concluded that Quon had violated the police department's rules and disciplined him. Quon and others initiated legal action against the City and also against Arch Wireless, alleging invasion of privacy and violation of Fourth Amendment rights against unreasonable searches and seizures.

The Supreme Court considered whether Quon had a reasonable expectation of privacy in his text messages. The City argued he did not, since its policy and the subsequent statement that text messages would be treated like emails precluded such expectation. Quon argued, however, that his payment for the overages rendered them his property. He also alleged that he was told by a lieutenant that if he paid for the overages, he would not be audited.

Without deciding the issue, the Court moved forward on the assumption that Quon had a reasonable expectation of privacy in the text messages. The issue then was whether the City's search of Quon's text messages was an unreasonable search under the Fourth Amendment. Citing earlier precedent, the Court noted that if a search were conducted for "noninvestigatory, work-related purposes" or for "investigations of work-related misconduct," it might be reasonable if it were "justified at its inception" and if the measures used were "reasonably related to the objectives of the search" and were not "excessively intrusive."

The Court concluded that the search in question was reasonable. It noted that, at its inception, the purpose of the search was to determine whether Quon and others were exceeding their character allotments in sending work-related texts. If this were the case, the City would have considered paying more to provide the pagers with larger character allotments. Another legitimate objective was to ensure that the City was not paying for officers' personal use of the pagers.

The Court further noted that the measures used were not excessive. Although Quon had exceeded his character limit numerous times, the investigation only reviewed two months of use. Further, all messages that Quon sent when he was off-duty were excluded from the audit.

Although the *Quon* case involved a governmental employer, and the issue at hand was whether the review of Quon's text messages violated the Fourth Amendment—which prohibits unreasonable searches and seizures by the government—the principles are likely to be applicable to private employers as well. While private employees may not have valid Fourth Amendment claims against their nongovernmental employers, they still may have viable claims for invasion of privacy and for public disclosure of private facts (if their "private" information were made public). A prudent private-sector employer should take all reasonable steps to reduce its employees' expectations of privacy and should ensure that employees were clearly warned of the employer's right to review electronic content that traveled through company-provided devices or the company's network.

What This Means for Employers

Employers who provide their employees with electronic communications devices should revisit and possibly revise their electronic communications policies and ensure that they expressly reference all transmissions that are sent from or to company-provided devices, regardless of whether the transmissions come through the company's server. This is a first step in eliminating or reducing employees' expectations of privacy for the content of transmissions. Second, before launching a search (or, as here, obtaining records of the transmissions from a third-party wireless provider), an employer should articulate clearly why it needed to conduct the search and how the specific methods would yield necessary information. Third, the employer should determine whether the scope of the search could reasonably be narrowed or limited and still serve the same purpose. Employers should not blindly rely upon language in policies that merely states that all such communications are subject to audit or search. It is clear from the Supreme Court's decision that even with such broad language, courts will examine the specific purpose of the search, whether that purpose serves a legitimate business interest, and whether the scope of the search is reasonably calculated to uncover necessary information, but stops short of uncovering irrelevant or extraneous information which is not necessary to the search.

For Further Information

If you have any questions about the information addressed in this *Alert*, please contact any of the attorneys in our Employment, Labor, Benefits and Immigration Practice Group or the attorney in the firm with whom you are regularly in contact.

Notes

1. *City of Ontario, California et al. v. Quon, et al*., 2010 U.S. LEXIS 4972 (U.S. June 17, 2010).
2. Emails would travel through the police department's server. Text messages, however, traveled from the officer's pager to Arch Wireless, Inc., a third-party wireless provider. The content of text messages never traveled through the police department server.