

Monitoring Employee Electronic Communications: A Violation of an Employee's Right to Privacy?

With the increasingly significant role that electronic communications such as email and text messages play in the work place, employers often face the question of whether they have the right to monitor these communications, or whether doing so would violate an employee's right to privacy.

In *City of Ontario California v. Quon*, 560 U.S., ___ (2010), the United States Supreme Court recently considered this issue with respect to the right of the City of Ontario Police Department to review an employee police officer's text messages sent via an employer-provided pager. The case was significant in that it was the first time the Supreme Court addressed the issue of an employer's right to monitor the electronic communications of employees sent and received during work hours by means of an employer-issued device. Although the Court announced that, given the evolving nature of technological communications, it would not issue any broad generalizations, the decision does provide useful guidance for employers as to the proper implementation of company policies and practices when it comes to monitoring employee electronic communications. Notably, although the case involved a public employer, the Court explicitly stated that its standards and rationale would be applicable to private employers, as well.

The employee police officers in *Quon* were given pagers by the police department in order to increase efficiency and response time. Each officer was granted a monthly character allotment for which the City paid, and officers were required to pay any charges incurred beyond that allotment. Noticing after several months that the pager use of some officers greatly exceeded the set allotment, the police department decided to audit text messages sent during work hours in order to evaluate whether the existing character limit was sufficient to meet the department's needs, or whether the excessive text message transmissions were due to an abundance of personal text messages. When auditing the text messages of Officer Quon, the department revealed an excessive number of personal text messages, including many of which were sexually explicit. Significantly, the police officers in *Quon* were well aware of the department's Computer Policy, stating that the department had the right to audit electronic communications, as well a memorandum issued following the distribution of the pagers, which explicitly stated that the Computer Policy applied to text messages.

The Supreme Court noted that the officers clearly understood that their text messages could be audited based on the department policy and memorandum. The Court further reasoned that the department's search was (i) motivated by a legitimate work-related purpose (i.e., evaluating whether the monthly character allotment satisfied the department's business needs), and (ii) not excessive in scope (i.e., only messages transmitted during work hours were reviewed). In a unanimous decision, the Justices held that the police department acted properly and did not violate the employee's expectation of privacy.

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The *Quon* case is instructive for employers in a number of ways:

- Employers should have an **electronic communication policy**, since monitoring the electronic communications of employees absent such a policy is generally prohibited.
- The employer's policy should clearly state that the employer has the right to monitor the electronic communications of employees, and thereby eliminate (or at least minimize) the **employee's expectation of privacy** in any electronic communications transmitted.
- Electronic communications policies should be periodically reviewed so that they are **current with respect to technological advances** in the work place.
- Employers should **distribute and clearly communicate policies** to employees, and supervisors should be trained not to make statements that undercut or weaken the employer's policy.
- Employees should **sign an acknowledgment** confirming that they have read and understand the employer's policy.
- An employer's review of employee electronic communications should be **reasonably tailored** (not unnecessarily excessive) and should be conducted for **legitimate work-related purposes** only.

However, a word of caution: the permissibility of monitoring an employee's electronic communications must be evaluated on a case by case basis. The nature of the employer's business, the type of electronic device, and the individual work place norms are all relevant in formulating a policy and strategy that will stand up to legal requirements, as well as practically enable an employer to conduct business in an efficient and productive manner.

As such, any employer policy dealing with the issue of monitoring employee communications should be created only upon consultation with experienced legal counsel.

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