

## Managing Employees in the Age of Oversharing

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As 2010 begins, now is a good time to review and update your employee policies and to ensure your managers are strictly following them. In particular, we suggest considering an update to your Computer Usage, Internet, and E-mail Policy. In today's world, the notion that an employee comes to work and focuses only on his or her job throughout the workday is unrealistic. Reports indicate that approximately 110 million Americans use social networks frequently. In fact, the average user checks a social networking site at least four times per day for a minimum of one hour.

Employees of all ages are using social networking sites and staying in contact with the outside world at all times. While "oversharing" has always existed, it has reached a new level with the advent of social networking sites, tweets, and text messages. Webster's New World Dictionary even chose the term as its Word of the Year in 2008, defining overshare as a verb meaning "to divulge excessive personal information, as in a blog or broadcast interview, prompting reactions ranging from alarmed discomfort to approval."

### **United States Supreme Court Grants Review of Employee Privacy/Text-Messaging Case**

In this new age of oversharing, the time employees spend "sharing" through technology can and does detract from employee production. In fact, the issue of employee text-messaging reached the United States Supreme Court. On December 14, 2009, the Supreme Court granted review in the case of *Quon v. Arch Wireless Operating and The Ontario Police Department*, 529 F.3d. 892 (9th Cir. 2008). In *Quon*, Plaintiff city employees sued the City and a text-messaging service under the Stored Communications Act (SCA), 18 U.S.C.S. §§ 2701-2711, and the Fourth Amendment, when they learned that City managers had read transcripts of text messages, as part of an overage audit, the employees sent on their city-issued pager. The Ninth Circuit Court of Appeal held that the City violated the Fourth Amendment and California constitutional privacy rights of the employees who sent and received the text messages. Importantly, the Court made this holding despite the City's written "Computer Usage, Internet, and E-mail Policy," which stated that use of city-issued pagers were limited to city business only and that employees were to have no expectation of privacy when using the devices.

Here, the problem was that a supervisor told employees that text messages would not be audited as long as employees paid any overage charges incurred, and the employees argued that they had relied on this statement. The Ninth Circuit held that the supervisor's oral agreement not to audit the messages trumped the written policy, thereby creating a reasonable expectation of privacy by the employees and any other individuals who sent messages to the employees. The Ninth Circuit further held that the City's review of the text messages was not reasonable in its scope as there were less intrusive means to audit overages.

The questions presented to the United State Supreme Court for review next year are:

1. Whether an employee has a reasonable expectation of privacy in text messages transmitted on his employer-provided pager, where the police department has an official no-privacy policy but a non-policy-making supervisor announced an informal policy of allowing some personal use of the pagers.
2. Whether the Ninth Circuit violated the Supreme Court's prior Fourth Amendment cases and created a conflict among the appellate courts by analyzing whether the police department could have used "less intrusive methods" of reviewing text messages transmitted by an employee on his employer-provided pager.

3. Whether individuals who send text messages to an employee's pager have a reasonable expectation that their messages will be free from review by the recipient's government employer.

Regardless of its outcome, this case should serve as a reminder to employers to ensure that not only are employee policies updated, but that they are also being strictly followed by managers.

### **Social Networking Policies Are A Must**

Most employers allow electronic social networking during business hours. A majority of employees say the ability to social network during the workday helps them achieve a better work-life balance and improves morale. With social networking here to stay, employers must adapt and develop sensible, manageable policies and practices to manage these issues. Policies should outline accepted practices and expectations with respect to employees' access of social networking sites during and outside work hours. An effective social networking policy should identify the kinds of social networking conduct that is permitted and those areas that are prohibited. Also, the company's policy should clearly state the company's expectations with respect to mentioning the Company's name or any work-related information. Finally, the policy should state the consequences for violation of its terms. Once updated, managers and supervisors must be educated regarding the policy, and the potential liability associated with on-line conversation or comments regarding current and former employees.

### **Light On the Other End of the Screen**

The use of electronic communication avenues does not always need to be cast in a negative light. A number of businesses and employers have embraced social networking for recruiting, marketing, communication, education, business networking, and background checks. For example, you can use a social networking site to post job openings or to receive applications. Many employers include a review of social networking sites such as Facebook and LinkedIn as part of the employee background check. Some employers communicate with their employees strictly through tweets and text messages.

Only you can determine the extent and use of social networking in your business. However, if you have any questions or concerns about your policies, or would like to learn more about social networking policies, please feel free to contact any member of Dinsmore & Shohl's Labor and Employment Department.