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Courts Provide Little Guidance on Technology in the Workplace

What's an employer to do?

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Employers awaited with curiosity last year as the U.S. Supreme Court considered the case of *City of Ontario, California v. Quon*, where the employer terminated an employee for transmitting sexually-explicit text messages on an employer-owned pager. The employer paid for the pager's service plan, but the employee reimbursed the employer for his personal use of the pager beyond the allotted minutes of the plan. When the employer performed an audit of pager use, to see if the service plan needed changed, it discovered the explicit messages and terminated the employee. The trial court upheld the termination, but the Ninth Circuit Court of Appeals reversed. Both courts ruled that the employee had a reasonable expectation of privacy, but disagreed on whether the employer's interests were sufficient to override the employee's right.

During the subsequent appeal, many hoped that the Supreme Court would shed some light on how to balance an employee's right to privacy with an employer's right to run its business. The first warning sign that this would not happen occurred during oral argument of the case. In discussing the concept of text-messaging, Chief Justice Roberts commented "I thought, you know, you push a button; it goes right to the other thing." Justice Scalia replied "You mean it doesn't go right to the other thing?"

Indeed, the Supreme Court eventually ruled that the case could be resolved without determining the extent of the employee's privacy rights. Assuming that the employee did have a reasonable expectation of privacy, the Court found that the employer's interest in auditing the pager records overrode that right. Thus, the Court declined to rule on what it called an issue of "far-reaching significance," stating that such a decision would be premature because it is "uncertain how workplace norms, and the law's treatment of them, will evolve." Thus, the *Quon* decision shed little light on the subject of texting in the workplace.

Then, earlier this year, it looked as though employers would receive some guidance from the National Labor Relations Board ("NLRB") regarding the concept of "Facebook firing" (terminating an employee for his or her posts on Facebook). In late 2010, the NLRB filed a Complaint against a Connecticut employer, alleging that its Facebook policy illegally restricted employees' rights to engage in concerted activity regarding the terms and conditions of employment. The case quickly settled, with the employer agreeing to revise its social networking policies to ensure that it did not interfere with employees' rights to discuss their wages, hours, and other conditions of employment. Because of the settlement, the NLRB never had to render an actual decision in the case. Thus, there will be no review by a court and, while the case provides some guidance, it has no precedential value.

Employers: What Steps Should You Take?

Although many questions remain unanswered by the courts and the NLRB, an employer can take proactive steps now to ensure that it has in place methods to deal with employees' use of technology in the workplace. Employers should update their computer use policies to make sure they cover smartphones and pagers. Such policies should also warn employees that they have no expectations of privacy in the use of company-owned devices, and that their activity on such devices may be monitored. Employers who do not already have social media policies in place should consider adding them. Such policies will vary depending upon how much an employer encourages the use of social media, if at all. One example might include (1) a prohibition against posting, blogging, tweeting, or otherwise using social medial on work time for non-work purposes; (2) a prohibition against using the company's (or a client's) name, identifying marks, or

confidential information on social networking sites without permission; and (3) a prohibition on the use of social media to harass co-workers and others. Such a policy should, of course, be enforced consistently.

Employers who already have social media policies in place should review them to make sure they are not overly broad. It is safe to assume that if an employee's speech is protected in the workplace, it is likely to be protected if made on Facebook. Thus, in order to reduce the likelihood of lawsuits and/or unfair labor practice charges, employers may want to limit their policies accordingly.