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# Labor & Employment Newsletter

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## UPDATE – Employee Privacy: When Are Employee Text Messages On Government-Issued Devices Protected

This is an update to Strasburger’s January 2010 Labor & Employment (“L&E”) Newsletter discussing the Ninth Circuit’s holding in *Quon v. Arch Wireless Operating Company*,<sup>1</sup> and the United States Supreme Court’s granting of the City of Ontario (the “City”), the Ontario Police Department (“OPD”), and the OPD’s Chief’s petition for certiorari on December 14, 2009.<sup>2</sup> The suit arose after police department officials for the City obtained transcripts of text messages between two police officers and another government employee while investigating whether department-issued pagers were being used for non-work purposes.

On June 17, 2010, the Court held that the City’s review of an officer’s text messages was reasonable and did not violate the Fourth Amendment. The Court disagreed with the Ninth Circuit and held that the search was reasonable and permissible because it satisfied the standard set forth in *O’Connor v. Ortega*.<sup>3</sup> Under this standard,

when conducted for a ‘noninvestigatory, work-related purpos[e]’ or for the investigatio[n] of work-related misconduct,’ a government employer’s warrantless search is reasonable if it is ‘justified at its inception’ and if ‘the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of ‘ the circumstances giving rise to the search.’<sup>4</sup>

The Court noted that the search was justified at its inception because it was necessary to determine whether the City’s contract with the wireless communication provider was sufficient to meet the City’s needs. This was a “legitimate work-related rationale” as the City had an interest in ensuring that employees were not being forced to pay for work-related expenses out of their own pockets or that the City was not paying for extensive personal communications.

The scope of the search was reasonable because reviewing the transcripts was an efficient and expedient way to determine whether the overages resulted from work-related messaging or personal use. The Supreme Court also found the review was not “excessively intrusive.” The OPD Chief requested and reviewed transcripts for only two months rather than all the months in which the employees exceeded the usage limit and all messages sent while the employees were off duty were redacted.

The Supreme Court held that even if the employee had a reasonable expectation of privacy in the messages’ contents, “the extent of an expectation is relevant to assessing whether the search was too intrusive.” While the employee could assume some level of privacy, it would be unreasonable for the employee to conclude that his messages were immune from scrutiny in all circumstances.

“Under the circumstances, a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being appropriately used.” The Court further concluded that simply because the search revealed intimate details of the employee’s life, this did not make it unreasonable because under the circumstances, a reasonable employer would not expect that such a review would intrude on the highly private details of an employee’s life.

Importantly, even though the case involved a public employer, the Court related the situation to private employers. “For these same reasons – that the employer had a legitimate reason for the search, and that the search was not excessively intrusive in light of that justification – the Court also concludes that the search would be regarded as reasonable and normal in the private-employer context.”<sup>5</sup>

The Court, however, stressed that the case was decided on narrow grounds to avoid the risk of error by “elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.”<sup>6</sup> The Court recognized that employers expect or at least tolerate personal use of employer-owned equipment because it often increases worker efficiency. As such, the law is beginning to respond to these developments. “A broad holding concerning employees’ privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted.”<sup>7</sup> For this reason, the Court preferred to decide this case on narrower grounds.

If you have any questions about the article, please contact the author.

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<sup>1</sup> *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892 (9th Cir. 2008).

<sup>2</sup> See the January 2010 L&E Newsletter at <http://www.strasburger.com/calendar/news/labor/Employee-Privacy-Text-Messages.htm> for a detailed factual background of this matter.

<sup>3</sup> 480 U.S. 709, 725-26 (1987).

<sup>4</sup> *City of Ontario v. Quon*, No. 08-1332, 2010 WL 2400087, at \*11 (June 17, 2010) (quoting *O'Connor*, 480 U.S. at 725-726).

<sup>5</sup> *Id.* at \*13.

<sup>6</sup> *Id.* at \*9.

<sup>7</sup> *Id.* at \*10.

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