



NEWS FLASH

Monitoring of Employees' Electronic Communications

Advancing technology enabling employees to remain connected and available to conduct business in a more efficient and sometimes remote manner is constantly evolving. Handheld wireless devices, palm organizers, laptops, BlackBerries, cell phones, facsimiles, computers, internet/intranet networks and email have all found their way into the workplace. Also growing and evolving along with technology in the workplace is an ever increasing need for the employer to prevent abuse of its resources and the mismanagement of working time. For this reason, many employers choose to monitor, or at least reserve the right to monitor, their employees' use of the employer's communication and information systems. Such monitoring, however, must be carefully balanced against any employee expectations that such use will remain private.

The U.S. Supreme Court has given a limited victory to employers in this balancing test. In the *City of Ontario v. Quon*, the Court was asked to consider whether the City of Ontario's Police Department ("OPD") violated Quon's privacy rights when it audited the text messages he sent on an OPD-provided pager. Quon, a sergeant on OPD's SWAT Team, was issued a pager to aid in responding to emergency situations and was advised that OPD reserved the right to monitor these messages, which Quon

acknowledged. Quon exceeded the limit for his texts and incurred additional fees for his pager use; in later discussions about these overages, an OPD member said that he would not audit the text if Quon paid for the overages. However, after several months of Quon and other SWAT Team members exceeding their usage, OPD decided to audit two months' of text messages to determine if the limit was adequate. During this review, OPD found that Quon sent a significant number of personal text messages during work hours, some of which were sexually explicit. After Quon was disciplined, he filed suit against OPD alleging that his rights were violated during the audit.

In a decision released on June 17, 2010, the Supreme Court declined to define or limit the existence and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices. Regardless of any employee privacy rights, the Court did find it significant that the employer purchased and provided the pager to Quon; that Quon was advised in advance that his text messages may be monitored; that the audit was completed for a legitimate business purpose; and that OPD took steps during the audit to exclude any messages sent while Quon was off duty. Based on these facts, the Court declined to find that Quon's privacy rights were violated. This decision is further significant because OPD is a public entity and, as such, Quon had greater privacy rights than an employee working in the private sector.

Given this decision in *Quon*, employers would be prudent to review their electronic communications and handbook policies to ensure that they are up-to-date and include all communication and information systems provided to employees. The employer's right to monitor these systems should be explicit and managers advised that oral representations of deviations from the policy cannot be made. Any monitoring of these systems should be related to legitimate business-related reasons. If you would like your electronic communications policies reviewed or have questions about the implications of the *Quon* decision, please contact a member of the Koley Jessen Employment, Labor and Benefits Group.

Itemized Wage Statement May Now Be Requested by Nebraska Employees

Prompted by the increasing need for employees to substantiate their income for personal financial reasons, such as obtaining a loan or mortgage, and confirming that appropriate deductions and withholdings were made from their pay, the

Nebraska Wage Payment and Collection Act (the "Wage Act") has been amended. Effective July 15, 2010, employees may request an itemized statement listing the wages earned and the deductions made from the employee's wages for each pay period. The employer must provide this statement (which must be in writing - either print or electronic format) within ten days of the employee's written request. An employer's failure or refusal to provide this documentation may result in fines of \$100 for the first offense, between \$100 and \$300 for a second offense within two years, and between \$200 and \$500 for a third offense within two years. If you have questions about the amendment to the Wage Act, please contact a member of the Koley Jessen Employment, Labor and Benefits Group.

This document is intended for informational purposes only and should not be construed as legal advice.

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