



Alert

Labor & Employment Client Service Group

To: Our Clients and Friends

December 15, 2009

U.S. Supreme Court To Review Whether Employees Have A Reasonable Expectation of Privacy For Personal Text Messages Sent To Or From Their Employer-Issued Pagers

On December 14, 2009, the U.S. Supreme Court announced that it would review a lower court ruling which held that a public employer violated an employee's Fourth Amendment right to privacy when the employer reviewed text messages sent from the employee's government-issued pager. The case is Ontario v. Quon, No. 08-1332.

This case has reached the Supreme Court from the U.S. Court of Appeals for the Ninth Circuit. Quon v. Arch Wireless Operating Co., 529 F.3d 892 (9th Cir. 2008), *petition for rehearing en banc denied*, 554 F.3d 769 (9th Cir. 2009). That Court of Appeals held that the employee's privacy rights were violated even though the employer had a general policy providing that employees could not expect any privacy for emails and Internet use sent through the employer's network, and could not use the network for private purposes. The Court of Appeals first found that this written policy did not expressly address paging services. The Court then found that the employer's manager with responsibility for supervising pager use had an informal policy that allowed employees to make private use of the pagers as long as the employees paid for excess usage above the city's subscription level. Finally, the Court found that the employer's review of the text messages was unreasonable because there would have been less intrusive methods of determining if employees were being charged for text messages actually sent in the course of their duties.

In previous rulings, the Ninth Circuit had ruled in various contexts that individuals had a reasonable expectation of privacy in their electronic communications or computer records, notwithstanding the network-provider's policies to the contrary. The latest ruling in Quon, extending this line of cases, met with dissent from seven judges of the Ninth Circuit who would have granted a petition for rehearing by the full Ninth Circuit. They expressed concern that the Court of Appeals ruling would undermine the standards for non-investigatory searches in the public workplace laid down in the Supreme Court's 1987 ruling in O'Connor v. Ortega, 480 U.S. 709 (1987).

This Client Bulletin is published for the clients and friends of Bryan Cave LLP. Information contained herein is not to be considered as legal advice. This Client Bulletin may be construed as an advertisement or solicitation. © 2009 Bryan Cave LLP. All Rights Reserved.

Unlike the public employer in Quon, private employers are not subject to the Fourth Amendment's restrictions on unreasonable searches of computers and electronic communications using the employer's equipment or network. Private employers are not "state" actors bound by the Fourth Amendment. However, private employers may be attacked for searching such communications or records through a common-law claim for invasion of privacy. Therefore, the Supreme Court's ruling in Quon is likely to have implications for private employers, as it may shed light by analogy on the sufficiency of private employers' anti-privacy policies to apply to particular technologies, when an employer's anti-privacy policies may be overridden by informal practices, and what types of searches will be found "reasonable" or "unreasonable."

For information about anything contained in this Labor and Employment Alert, please speak with your regular Bryan Cave LLP contact, or contact anyone in the Bryan Cave [Labor and Employment Client Service Group](#).