LEGAL UPDATES

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Supreme Court Cautions on Scope of Employee Privacy Interests in Electronic Communications

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In its first decision involving employee privacy rights in electronic communications sent over a mobile device, the Supreme Court determined that an employer's reasonable and legitimate reasons to search the content of those communications superseded the employee's privacy claims. On June 17, 2010, the Supreme Court reversed the Ninth Circuit's decision in City of Ontario, California v. Quon, and found that the City had not violated its employee's Fourth Amendment rights when it audited the messages sent from a City-owned device, which revealed that the employee had violated the City's usage policy. However, the Court limited its ruling to the facts presented and refused to issue a blanket declaration that employees do not have a reasonable expectation of privacy to communications sent over employer-owned equipment cautioning that, "The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear."

Quon, a police officer, was issued a pager capable of sending and receiving text messages to use on the job. He and other officers were informed that the devices were subject to a monthly character limit and were covered by the City's "Computer Usage, Internet and E-mail Policy." The Policy stated that employees had "no expectation of privacy or confidentiality" when using resources covered by the Policy, and that all network activity could be monitored without notice. Quon repeatedly exceeded the character limit set by the City, but was told by a supervisor that he could avoid an audit of his messages by reimbursing the City for his overages, which he did.

Because so many employees were exceeding the usage limit, the City performed an audit to determine whether the limit needed to be increased.

The audit revealed that the vast majority of Quon's on-duty messages were personal, and many were sexually explicit. Quon and several recipients of his communications sued, alleging that the City had violated their Fourth Amendment rights.

The Ninth Circuit found that the search violated the Fourth Amendment, because even though it had been conducted for a proper business purpose, the availability of less intrusive options rendered it unreasonable. The Supreme Court reversed holding that the search was both initiated for a legitimate business purpose and that it was reasonable in scope. The Court noted that the City limited its audit to messages sent over only two months and did not examine messages sent during non-work hours. As applied to the facts at issue, the Court noted that the Fourth Amendment only required that the scope of the search be reasonable, but did not require that it be the least intrusive search possible. The Court also noted that the search would be considered reasonable in the private-employer context.

The Court declined to determine if Quon had a reasonable expectation of privacy in the text messages themselves. Expressing its desire to avoid unnecessarily passing judgment in areas of swiftly advancing technology for fear of creating unwieldy precedents, the Court acknowledged that the City's handling of the matter was proper even if a reasonable expectation of privacy existed. The Court also refused to specifically comment on the impact of the supervisor's oral representation to Quon and its effect on the City's written policy. However, employers should note the importance of training to avoid situations in which management-level employees contradict corporate policies in a manner that could give rise to an employee's privacy claim.

What This Means to You

Even though the issue of Quon's expectation of privacy was avoided by the Court, employers should maintain written policies which address employees' expectations of privacy when using all employer-maintained electronic devices and networks.

The policy should state that it cannot be modified by a supervisor's statement or conduct.

Management-level training should specifically address the importance of the issue.

Any searches of employee activities under the policy should be in furtherance of a legitimate business purpose.

Although the least intrusive search is not necessary, it is best to keep searches narrowly defined to cover the employees' normal working hours and/or work-related activities over a specific period of time.

Contact Information
If you have any questions about this or other employment matters, please contact your Husch Blackwell Sanders attorney.

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