Employee Privacy in the Workplace

By Lynne Eisaguirre

In a hotly awaited decision, the U.S. Supreme Court ruled on June 17 on the privacy of workplace texting. The Court held that a city audit of an employee's messages on a city-owned pager was a reasonable search under the Fourth Amendment.

In a rare unanimous decision, in *City of Ontario California v. Quon*, the Court sidestepped whether police Sergeant Jeff Quon, the employee, had a reasonable expectation of privacy in his text messages. Some of the messages were private and sexually explicit.

The court held that the city's search—which was aimed at determined whether city employees in general needed a higher number of minutes on their pages—was reasonable under the Fourth Amendment.

This case is different than most workplaces, since it was a public workplace where the Fourth Amendment would be in full force. In private workplaces, employers generally have greater leniency to engage in searches.
Quon had challenged the search but a jury in California found the search was done for work related reasons and did not violate the Fourth Amendment. The 9th Circuit reversed and found that the search was unreasonable. The U.S. Supreme court reversed that decision.

The court cautioned against deciding too quickly about the level of privacy that new communications technologies deserve. Justice Kennedy, writing for the Court, said that "rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior." Cell phones and text-message communications he wrote, are "so pervasive that some persons may consider them to be essential means or

necessary instruments for self-expression, even self identifications." In most situations, that would argue for a higher expectation of privacy, but the fact that employers have policies about private use of company-owned devices would dictate a lower level of privacy.

Some lawyers expressed surprise at the decision, especially after the April 19 argument in the case in which several justices exhibited a lack of high tech expertise. Chief Justice John Roberts Jr., for example, asked what was the difference between an email and a pager!

TIPS: How to Clarify Employee Privacy Expectations in your own Workplace

1. Write a careful policy. Even with this decision, it's critically important to have very clear policies on these devices, to communicate them to employees, and to make searches no more intrusive than necessary.

Typically, a court will first determine what was the *expectation* of privacy. An employer can change employees' expectations by drafting a policy expressly stating that there is no such expectation. Clearly, employees have a higher expectation of privacy in their own private thoughts and bodies, for example, than they do in a computer owned by the company and used for work related purposes.

2. Limit any searches to make them reasonable. A court will examine whether the search was reasonable, so the limitation in scope will help with that issue. Even though the Court in *Quon* was inconclusive on the extent of privacy rights involved, the ruling was full of references to privacy interests and the need for searches to be limited and work-related.

3. Have a good reason. Make sure it's work related.

4. Relate the means used to invade privacy to the end. Are they rationally related?

The bottom line is that employees do not have an absolute right to privacy. Whether they have privacy may depend, in large part, on whether you've followed these tips.