

Further Advice on Employees' E-mail

A case pending before the Supreme Court, discussed by the *Washington Post* January 15, shows the importance for employers to not only draft strong technology use policies but also to strictly enforce such policies according to their written terms. It also highlights the need for technology use policies to cover devices beyond computers, such as mobile phones, pagers and other wireless devices. Likewise, the scope of the policies should reach beyond e-mail to address other means of communication like text and instant messaging.

In *City of Ontario v. Quon*, the Supreme Court will consider whether a government employer can read text messages sent and received by government employees on employer-owned wireless devices. Despite the City's written policies allowing it to review messages sent using City-owned equipment, the Ninth Circuit found that Sgt. Quon had a reasonable expectation in the privacy of his text messages due to the City's "informal" policy of not reviewing an employee's text messages if the employee paid for overage charges resulting from excessive messaging.

While *Quon* addresses constitutional issues unique to government employers, it also is important for private employers on the issue of expectation of privacy. Thus and as per our December 2009 e-Alert, a well-drafted technology use policy ought to be strictly enforced according to its terms and should provide that:

- the company's e-mail system and other means of communication are to be used for business purposes, with only incidental personal use permitted;
- all information contained, sent or received on the company's computer systems (including, where applicable, company-issued mobile devices, pagers, text and instant messaging systems and other wireless devices) is the property of the company;
- the information above includes all means of communication (including e-mail, text and instant messaging)
- the employees have no right to or expectation of privacy with respect to any such information; and
- the company reserves the right to access, review and disclose any such information.

Hughes Hubbard's Labor & Employment Department has extensive experience, including litigation, with respect to such technology use policies and would be pleased to provide assistance and representation.

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