



Newsletter August 2010

## **Five Takeaways from Recent Supreme Court Privacy Ruling**

*Chances are, text messaging, e-mail, and smartphones are some of the types of modern electronic technology that are now staples in your workplace. And the U.S. Supreme Court recently addressed the topic when it ruled on an employee's right to privacy when using a messaging device issued by his employer. In *City of Ontario v. Quon*, the Court held that a public employer didn't violate an employee's constitutional privacy rights by searching his personal (and often sexually explicit) text messages that were sent and received on his employer-issued pager.*

*Although the case involved a public employer, it could easily affect private employment as well. With that in mind, there are several things employers (both private and public) should take away from the case.*

### **#1: Employees do the darndest things**

Your employees are going to surprise you. They are going to do things that leave you wondering "What were they *thinking*?" In this case, Jeff Quon was the employee who shocked his employer with his actions.

The case began when the city of Ontario, California, issued Ontario Police Department (OPD) SWAT Team members, including Quon, pagers that could send and receive text messages. When the OPD was charged with overage text message fees, it looked at the transcripts of text messages sent during a two-month period by Quon and another employee who had exceeded the text allowance. Much to the department's surprise, it discovered a plethora of messages on Quon's pager that weren't work-related, including some that were sexually explicit. (Adding to the scandal, the individuals who had exchanged text messages with him during the applicable

period included his then-wife, his girlfriend (who was another OPD employee), and another SWAT coworker.)

You need to make sure you're prepared for such unpleasant surprises and have a system in place to take disciplinary action, if necessary. (In Quon's case, the matter was referred to the OPD's internal affairs division, and he was allegedly disciplined.)

### **#2: Tread carefully - employees may sue**

You always need to be prepared for the possibility of a lawsuit when adverse action is taken against an employee or an employee's electronic communications are examined. After Quon's texts were reviewed, he sued, alleging that the city violated his privacy rights under the Fourth Amendment to the U.S. Constitution. Although the district court ruled that his rights weren't violated, the Ninth Circuit reversed, holding that he had a reasonable expectation of privacy in his text messages and that the OPD's search "was not reasonable in scope."

The Supreme Court disagreed with the Ninth Circuit, unanimously holding that the search was reasonable and permissible because it was motivated by a legitimate work-related purpose and wasn't excessive in scope. Although the case involved a public employer, the Supreme Court related the situation to private employers as well by noting, "For these same reasons - that the employer had a legitimate reason for the search, and that the search was not excessively intrusive in light of that justification - the Court also concludes that the search would be 'regarded as reasonable and normal in the private-employer context.'"

This case illustrates how both private and public employers may face lawsuits if they go too far when monitoring employees' electronic communications. If a search wasn't conducted

for a legitimate work-related reason or was excessively intrusive, you may be in trouble. That means you need to tread carefully when conducting searches, and it's a good idea to talk to your attorney before accessing an employee's electronic communications.

**#3: *The rules regarding electronic monitoring are up in the air***

In its ruling, the Supreme Court made certain to stress that not a lot should be read into this one decision since it was decided on narrow grounds. The Court decided to take a narrow approach to the case because it was wary of a broad holding's impact on employees' expectations of privacy when using employer-provided communication devices. More specifically, the Court noted in its opinion that "a broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted."

The Court seemed concerned that technology is evolving in such a way that makes it difficult for courts to keep up. Therefore, although it addressed for the first time the issue of employers' monitoring of employees' electronic communications, it didn't establish a new privacy rule for the digital age or provide much more guidance or understanding on the issue. Instead, its decision was closely tied to the specific facts of this particular case.

**#4: *You must have electronic communications policies***

One thing you should take from this case is the importance of electronic communications policies. Your policies should be very clear and, among other things, should explicitly set out that:

- employees have no expectation of privacy in electronic communications they send or receive on the organization's resources; and
- the organization has the right to monitor or review any communications sent or received on its resources.

Your policies should also be set up to evolve with the rapid pace of technology.

It's crucial that your employees understand the policy. It should be distributed to all employees, and it's a good idea to have them sign either an electronic or hard copy. Additionally, you should routinely train your employees on the policy.

**#5: *Make sure supervisors enforce your policies***

This case illustrates the need for you to not only have privacy policies but also make sure supervisors are *uniformly* enforcing them. The OPD had a "Computer Usage, Internet and E-Mail Policy" that specified that employees had no expectation of privacy or confidentiality when using computers, e-mail, or the Internet. It had clarified that the policy also applied to pager text messages. In his suit, however, Quon contended that he had an expectation of privacy with the text messages because a supervisor informally told him they would be private if he paid the overage charges himself. This case also reveals the need for your supervisors to understand that they should never make informal arrangements that contradict your specific written communications policies.

***Bottom line***

Although technology can be extremely helpful to you, it's always evolving and can be hard to keep up with. However, it's important for you to stay up to date with technology and adjust your workplace policies accordingly.

**Lunches, Breaks, Overtime 101**

Are your employees entitled to a lunch break? What about a coffee break? How many hours can you require employees to work in a week and how are they compensated?

**Basic introduction**

This article focuses on U.S. law. You are legally bound to follow several sets of laws (Federal, State and sometimes even City). Federal labor law applies to all employers in the United States.

### Hour limitations and overtime

Can employees be forced to work overtime? The short answer is “yes”, but you will obviously want to consider the morale issues and try to balance them with your business needs. Employers can dictate work schedules and can modify them to best fit their business objectives as often as necessary. Employees who refuse to work extra hours are in violation of “working their shift” and can be disciplined for failure to comply. Employers should be careful when playing the “mandatory overtime” card, however, and you may want to consider offering overtime on a voluntary basis first before forcing employees to rearrange their personal lives to meet the company’s business objectives.

Federal law does require overtime pay if employees work more than 40 hours in a week. This means you must pay 1.5 times your employee’s normal hourly rate for hours worked over 40 (holiday, sick, vacation, PTO hours do NOT count as hours worked).

Many of the questions surrounding this topic focus on exactly what time counts as “hours worked.” The answer is BASICALLY whether or not the employee is doing regular work duties. If so, that is considered working time, it must be paid and it must be used when calculating overtime.

Here are two good examples: 1.) A receptionist regularly eats lunch at her desk, but still answers the phone and greets customers - this is working time. 2.) Paid firefighters play cards at the firehouse while waiting for an alarm - this is working time as well.

In addition to the Federal overtime regulations, some states like California have specific overtime laws that require most employers to pay 1.5 times hourly rate on hours worked over 8/day.

### Lunch requirements

Under federal law, employers do not have to provide lunch or coffee breaks, nor do you have to pay you for lunch breaks that are given.

However, your state might have mandatory meal breaks. The requirements vary, but many employees are guaranteed a 30 minute meal period per shift. To qualify, shifts will generally need to be 6 hours, and maybe even 8 hours long.

The following states require meal periods: California, Colorado, Connecticut, Delaware, Illinois, Kentucky, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New York, North Dakota, Oregon, Rhode Island, Tennessee, Washington, and West Virginia.

To find your state’s requirements, consult the Department of Labor’s handy chart: [meal periods](#).

### Rest Breaks

Like meal periods, the federal government does not require coffee breaks. However, Federal law does say that any short breaks (usually 5-20 minutes) that are given must be paid.

A few states give employees a right to short breaks. In these states, employees generally get a 10-minute break for every 4-hour shift. These states include: California, Colorado, Illinois, Kentucky, Minnesota, Nevada, Oregon, and Washington.

For your state’s requirements: [rest period](#).

### Deadline for EEO-1 Report Looms

Covered employers must file the EEO-1 Report--formally known as the "Employer Information Report"--by September 30, 2010.

In the past, the Equal Employment Opportunity Commission made substantial revisions to the EEO-1 Report form, including new race and ethnicity categories. Employers are required to use the new format for the report.

Last year, employers weren’t required to resurvey employees using the new race and ethnic categories before submitting the new EEO-1 Report, but many followed the EEOC’s recommendation that they resurvey as soon as possible and did so last year. Employers are required to resurvey before submitting the

form in 2010. The EEOC's preferred method for collecting the data for the form's race and ethnic categories is self-identification by employees (as opposed to visual identification by employers).

The new EEO-1 report continues the practice of requiring employers to use employment figures from any one pay period between July and September.

The EEO-1 Report--formally known as the "Employer Information Report"--is the principal reporting form by which employers provide the federal government with a count of their workforces by ethnicity, race, and gender, divided into job categories.

The Equal Employment Opportunity Commission (EEOC) requires the EEO-1 Report annually from private employers with **100** or more employees and federal contractors with federal government contracts of \$50,000 or more and 50 or more employees.

**These articles should not be construed as legal advice or as pertaining to specific situations. Consult with your legal counsel for further information.**

## Stay "In The Know" in 2010 –

### Educational Seminars

We have a variety of educational seminars planned for 2010. Some will be live from the office of our partner in Campbell. Others will be conducted using "Go To Meeting" web conferencing.

Leavitt Pacific Insurance Brokers  
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Campbell, CA 95008

### August Educational Session

#### Retirement Plan Success with Jeff Justi

This presentation will focus on ways to promote your retirement plan by implementing effective defaults which help removing obstacles to managing and maintaining a successful retirement plan.

#### Agenda:

- Learn how you can take an ordinary retirement plan and bring in all the professional managerial elements that contribute to participant success.
- Learn how to increase participation from 20% to above 80%.
- Learn how to help participants meet their funding goals, increasing the likelihood of a fully funded retirement

- Learn about ways participants can take the stress out of managing their investment portfolio

We are offering two options for this meeting:

1. LIVE! with Jeff and Ron from 10:00 AM to 11:00 AM [Register for Live Session](#)
2. "Go to" session for call-in attendees from 11:15 to 11:45 AM [Register here](#)

### OHR's Quarterly Harassment Prevention Training for Managers

As a service to your business we have a quarterly Harassment Prevention Training. Those sessions occur each quarter on the last Thursday of the month at 1:00 PM. Mark your calendars for March, June, September and December. We also do individual sessions for your offices, including Managers and Supervisors and non supervisory employees.

The next OHR Harassment Prevention Training for Managers session is scheduled for September 30<sup>th</sup> at 1:00 pm in Campbell, CA. To register please RSVP to [Harassment Prevention Training](#)

### September Educational Session

## Documentation Techniques for Managers

This session will focus on human resource documentation techniques for Human Resources professionals and Managers.

### Agenda:

- What is documentation?
- What should be Documented - and what should not be documented

- Where is documentation filed
- Who uses documentation
- How to document appropriately

RSVP [Register](#) here by Monday, September 27th. This is a "Go To Meeting" via web conferencing application. This is not a live session.

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