



# EMPLOYMENT ALERT

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### Tighten Up Your Privacy Policy for Employee Emails and Texts Supreme Court Case Holds Lessons for Employers

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Do you have the right to read text messages that your employees send on pagers or cell phones that you provide to them? You would think so, but a recent decision by the U.S. Supreme Court<sup>1</sup> held that an employee was *presumed* to have a right to privacy in using employer-provided equipment, in spite of his employer's very stringent policy and clear notifications to the contrary. While the case focuses on a government employee and the court ultimately ruled in favor of the employer, its decision (and the fact that it got all the way to the Supreme Court) provides useful guidance to private sector employers on their management of electronic communication systems and privacy issues.

#### The Case

The Ontario, California police department issued pagers to its employees, along with a clearly worded written policy advising them that it had the right to monitor all network and email activity, including text messages, with or without notice, and that users should have no expectation of privacy or confidentiality when using these resources. Employees even had to sign a statement acknowledging that they had read and understood this policy.

The department discovered that one of its officers, Quon, had misused the pager by sending personal text messages while on duty, and disciplined him. Quon sued, alleging that the search violated his Fourth Amendment rights (the Fourth Amendment protects us from unreasonable searches by the government; private sector employers don't have this concern but the issues in the private sector are similar). Quon bolstered his case with evidence that his supervisor told him it would be okay for him to use the pager for personal messages, as long as he paid for any charges for exceeding the department's usage plan.

#### The Ruling

Ultimately, the Supreme Court ruled in favor of the department, holding that the search was reasonable under the Fourth Amendment. But significantly, the court *presumed* that Quon had an expectation of privacy in his text messages, in spite of the department's measures to protect itself. And also in spite of those measures, Quon had a strong enough case to drag his employer through a protracted and expensive litigation.

The court noted that, given the growing use of employer-issued equipment for personal use, "many employers expect or at least tolerate personal use of such equipment by employees because it often increases worker efficiency." Indeed, some states have passed statutes requiring employers to notify employees when monitoring their communications. That trend, compounded by Quon's supervisor's statement to him that he could use the pager for personal messages, led the court to warn that employers' policies and actions



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“shape the reasonable expectations of their employees.” You need to make sure you shape your employees’ expectations in the right way.

### What This Means to Employers

The wording in an employer’s policy is critical, and these decisions provide important lessons:

- **Review electronic communications and usage policies.** Employers should ensure that their policies put employees on notice that communications transmitted on employer-owned equipment and networks are not private and may be monitored. The policies should explicitly state that employees should have no expectation of privacy in these communications
- **Train supervisors.** Supervisors should not say anything to contradict or weaken these policies or imply to employees that they have any right to privacy in these communications.
- **Scope of the policies.** Employers’ electronic communications and usage policies should be broad enough to cover both communications that are transmitted through a company’s own server and communications that are transmitted through an outside provider’s service.
- **Acknowledgments.** Employers should require their employees to acknowledge in writing all electronic communications and usage policies, and should file copies of the signed acknowledgments in employee personnel files.

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<sup>1</sup> *City of Ontario v. Quon*, 2010 U.S. LEXIS 4972 (U.S. June 17, 2010)