

# Getting the message

## Set policies for use of phones, computers and other devices

To most people, a cell phone is now a virtual appendage of their bodies, whether it's their own personal phone or one provided by their employer. And many employees who are provided with cell phones, computers and other electronic devices by their employers can start to believe their use of these devices is private and protected from employer review.

Accordingly, it's critical for employers to dissuade employees from such a belief, lest the employer end up on the wrong side of a jury verdict.

Consider, for example, the following situation:

In 2001, the City of Ontario, Calif., issued pagers to its special weapons and tactics (SWAT) team with limited texting to aid in mobilizing and responding to emergencies. At that time, the city informed all employees the city considered all text messages public information that was eligible for auditing. There was no expectation of privacy or confidentiality.

Over the next year, Jeff Quon, a police sergeant with the city, and others repeatedly surpassed their monthly texting limits and, for a time, personally paid for their excess use. Eventually, city employees grew tired of serving as bill collectors for these charges, so the city decided to review employees' texting to determine whether the texting limit was too low or if the overages were for personal use. As part of this review, the police chief ordered transcripts of Quon's texts sent during a two-month period and discovered numerous personal messages, including sexually explicit ones. In fact, during one of the months, Quon sent 456 messages during work hours, of which only 57 were work-related. This violated city rules, so Quon was disciplined.

Quon sued the city, claiming its review of his text messages violated his Fourth Amendment rights against unreasonable search and seizure.

After lower courts issued conflicting decisions, the case made its way to the U.S. Supreme Court. The Supreme Court determined the city review of Quon's messages was, indeed, reasonable because the city ordered the search to determine whether the texting limit was sufficient to meet city needs — a legitimate, work-related rationale. (If the purpose for the audit had been to determine if Quon was using his pager to play games and waste time, the audit might not have been deemed constitutionally reasonable).



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The city had a legitimate interest in ensuring employees were not being forced to pay out of their own pocket for work-related expenses, but also that the city was not paying for extensive personal use. Further, reviewing the transcripts was an efficient and expedient way to determine whether Quon's overages were the result of work-related messages or personal use, no matter there were other ways to obtain the same information. Also, the fact the city only reviewed a two-month sampling and redacted all messages sent while Quon was off-duty meant the review was not excessively intrusive.

Finally, as to Quon's expectation of privacy, a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being used appropriately.

Lesson: Because Quon's employer was a public entity, the decision hinged on whether the city violated Quon's Fourth Amendment rights. Purely private employers aren't required to comply with the Fourth Amendment. However, private employers or individuals who interfere with another's "reasonable expectation of privacy" could be liable for actual damages; compensatory damages for emotional distress, humiliation and loss of enjoyment of life; and punitive damages.

An employer can reduce or eliminate an employee's "reasonable expectation of privacy" by implementing written policies that inform employees the employer intends to take certain actions. For example, employers should make sure it's crystal clear to their employees, both in writing and orally, that text messages — as well as all other communications sent via any company owned or leased electronic communications — sent on company owned or leased conveyances are not confidential and also subject to audit. Further, those policies should advise employees about the organization's right to review, copy, disseminate and use for its own purposes any information on its computers, e-mail and voice mail.

In sum, it's essential for employees to understand they have no reasonable expectation of privacy when using their employers' cell phones, computers, e-mail, voice mail or other electronic devices.

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