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Texting in the workplace? Dangers abound

Texting and other e-communications in the workplace pose serious privacy and safety concerns to

employers and employees alike. On the one hand, electronic communications by employees can implicate privacy and other rights, thus possibly subjecting employers to liability. On the other hand, an employee's mere act of texting or writing e-mail, regardless of its content, while operating a motor vehicle



GUEST COLUMN

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poses a serious physical risk to the employee and others. Again, this activity exposes employers to potential liability.

The U.S. Supreme Court just issued its long-anticipated decision in *City of Ontario v. Quon*, a case involving a police department's right to review its employee's text messages with his mistress. The employee claimed that even though the police department issued the pager and had a policy declaring that such messages were not private, he had a reasonable expectation of privacy in those messages.

While the court assumed that the employee had a reasonable expectation of privacy, the court held that the police department's review of the messages was not an

invasion of the employee's privacy because its review was limited in scope and was done for a "legitimate work-related purpose."

The decision confirms that a government employer may review the contents of an employee's digital communications in which (a) the device used to send the communications is issued by the employer, (b) the employer gave advance notice that the employer can review such communications, (c) the review is conducted for a legitimate business reason and (d) the government uses care not to review messages sent or received while the employee was off-duty. On this last point, however, the court held that government employers do not have to use the "least intrusive" review available. Rather, the touchstone for this review appears to be what is reasonable under the circumstances.

What is most telling about the court's decision in *Quon* is what the court did not say. The Court expressly declined the opportunity to resolve the many unsettled issues relating to privacy and e-communications. It did not declare that its rule in *Quon* would or would not apply in the context of private employers.

The court chose to "proceed with care" and take cover in the uncertainty of this area of law given the relative infancy of e-communications in the workplace, noting that "it is uncertain how workplace norms, and the law's treatment of

them, will evolve." This judicial placeholder is a strong signal to the business community that while *Quon* should serve as a caution flag to employers who are considering monitoring their employees' e-communications, it will not be the court's final pronouncement on the issue.

So, what should private sector employers do? First, they should assume that courts will certainly look to the principles set forth in *Quon* for guidance when deciding privacy claims made by a private-

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sector employee against an employer. Second, employers must create and institute clear, written policies regarding their review of e-communications sent or received by employees during working hours and on employer-issued devices. Third, if employers decide to search an employee's e-communications, they must ensure that they have a legitimate business reason for doing so before conducting a reasonable search.

Fortunately, the texting-while-driving issue is more straightforward. Currently, Rhode Island and Massachusetts generally prohibit drivers from composing, reading or sending text messages (including e-mail) while operating a motor vehicle on any public street or public highway. "Text messages" include traditional short-message-service text messages, e-mails, instant messages, and, in Massachusetts, Internet searching. While

the public policy behind such laws is obvious and commendable, employers must understand that employees who break these laws while on company time, while doing company business, while driving the company car, or while using a company-issued mobile device, may expose employers to substantial liability if the employee causes an accident.

So what should employers do? First, employers should communicate to their employees that they are expected to comply with all laws while on company time and using company property, such as a car or company-issued mobile device. Employees should be informed that their safety is paramount, and that they must resist any temptation to e-communicate while driving. Second, employers should amend their employee handbooks to alert their employees to these new texting-while-driving laws, and emphasize that failing to comply with these laws constitutes grounds for discipline and termination.

These steps are critical, because employers may be held liable for their employees' negligence while on company time, in a company vehicle, or while doing company business. The explosion of mobile communications – and now laws restricting their use – adds another layer of complexity and exposure for employers to keep in mind as they formulate their personnel policies. ■

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