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For Your Eyes Only: Employee Privacy on Employer Systems

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Where is the line between an employee's right to privacy and an employer's right to monitor its employees while on company time or using company equipment or networks? How is an employer charged with preventing harassment supposed to effectively monitor the large volume of communications between its employees? While the law has yet to establish bright-line answers to these questions, recent legal developments provide some guidance.

First, the U. S. District Court for the District of Columbia recently upheld an employee's assertion of attorney-client privilege over emails to his attorney sent from his work email account, despite the fact that the employer routinely monitored and stored these communications. *Convertino v. United States Department of Justice*. In his ruling, Judge Royce C. Lamberth stated that the critical issue is whether the employee had a reasonable expectation of privacy in the communication. While stressing that this was a fact-specific analysis, Judge Lamberth listed four factors for making such a determination: (1) whether the employer has a policy against personal or objectionable use of the email system; (2) whether the employer monitors employee use of the email system or computers; (3) whether the email or computer systems can be accessed by third parties; and (4) whether the employee was notified by the employer, or otherwise aware, that email and computer use was being monitored. Although the employer routinely accessed and saved emails, it did not have a policy banning personal use of the email system, and it did not notify employees of its monitoring efforts. Thus, Judge Lamberth found the employee's expectation of privacy to be reasonable.

In December, the United States Supreme Court agreed to hear the case of *Quon v. Arch* Wireless Operating Company, which deals with the limits of employee privacy expectations when using text messaging services that belong to the employer. In *Quon*, the employer was the City of Ontario Police Department, and it maintained a policy that prohibited personal use of "City-owned computers and all associated equipment, software, programs, networks, Internet, email and other systems operating on these computers." The City specifically told employees that their use of these systems could be monitored, and warned them that there was no expectation of privacy in these communications. The policy did not specifically mention text messages, however; and a police official told employees that their text messages would not be monitored unless they failed to pay for charges above a set monthly amount. During an investigation into personal use of pagers, the police department obtained copies of several text messages, some of which were sexually explicit. The employees sued both the City and the wireless service provider who provided the messages, alleging violations of the Fourth Amendment and the Stored Communications Act. The district court rejected the employees' claims with regard to the Stored Communications Act, but the Ninth Circuit reversed this decision. According to the Ninth Circuit, the wireless service provider was liable to the employees for turning over their communications without their consent. Additionally, the Ninth Circuit found that the Fourth Amendment claim required a fact-specific analysis as to whether the employee had a reasonable expectation of privacy in the communication. Because of the department's informal policy of not monitoring text messages, and their extremely invasive method of investigating the use of text messaging without employee consent, the court found that the employees did have a reasonable expectation of privacy in their communications. This decision stands in stark contrast to the majority of courts that have held that employees have no expectation of privacy in communication sent over equipment or networks maintained by employers.

The Supreme Court's decision on the *Quon* case will likely provide some guidance to employers as to how far they may go in monitoring employees' electronic communications. Because it involves a public employer, however, its application may be somewhat limited for private employers. In the meantime, employers are well-advised to maintain a clear policy regarding electronic communications, including text messaging, by employees. Such policies should clearly state that employees have no expectation of privacy in those communications, prohibit harassing or otherwise objectionable communications, and delineate the employer's practices with regard to monitoring, accessing, or storing electronic communications.

Baker Donelson stands ready to assist you with these and other employment-related challenges. For assistance, please contact your Baker Donelson attorney or any of our more than 90 attorneys practicing labor and employment law, located in *Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville* and *New Orleans, Louisiana; Jackson, Mississippi;* and *Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee*.

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