

## Employment Alert

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### Managing Emerging Forms of Electronic Communication In The Workplace

Most employers have policies in place by now to address the widespread use of e-mail in the workplace. When it comes to newer forms of electronic communication, such as text messages and instant messaging, however, employment policies typically are silent and therefore outdated. If unprepared, employers may face a variety of issues, from inadvertently failing to preserve electronic information after a lawsuit is filed to unwittingly permitting inappropriate texting between employees.

Increasingly, courts are requiring litigants to preserve and produce text messages and the like if they pertain to ongoing litigation. As a result, employers may find themselves in uncharted waters with respect to their document retention policy if they provide employees with electronic devices, e.g., cell phones, pagers, BlackBerries, for the purpose of sending and receiving work-related text messages. Employers that allow business texting but do not thoroughly educate themselves on questions like the type of electronic data captured by company-issued devices, whether such data is retained, and how, are at a disadvantage in litigation. A federal judge in Florida, for example, recently sanctioned defendants who deleted text messages from their BlackBerries after they were ordered not to destroy "information and documents which are potentially relevant to [the plaintiff]'s claims." *Southeastern Mechanical Services, Inc. v. Brody*, 2009 WL 2883057 (M.D. Fla. Aug. 31, 2009).

Even outside of litigation and document retention contexts, employers must assess whether to monitor things like texting in the workplace and how to handle inappropriate employee communications. Furthermore, existing workplace policies prohibiting harassment may be obsolete if they do not explicitly cover text messaging and information posted by employees on Internet social networking sites such as Facebook and Twitter.

In considering what level of monitoring of employee communications is permissible, issues such as who owns the communication device and any expectation of privacy regarding the device must be included in the mix. On Monday, April 19, 2010, the U.S. Supreme Court will hear oral argument in *Quon v. Arch Wireless Operating Co.*, to decide whether public employees have a reasonable expectation of privacy in text messages transmitted using pagers issued by their employer, the city of Ontario. Although in that case the employer lacked a written workplace policy specifically addressing text messaging, it did have an all-purpose technology policy limiting "[t]he use of City-owned computers and all associated equipment" exclusively to work-related purposes, and emphasizing that access to the Internet and e-mail is "not confidential." During an internal investigation, the employer obtained from its service provider transcripts of text messages containing sexually explicit communications between employees. The Ninth Circuit Court of Appeals concluded that by accessing the text messages, the employer violated the Fourth Amendment's protection against unreasonable searches and seizures. Although only public employers are subject to the Fourth Amendment, the Court's ruling in *Quon* inevitably will have broad impact on how all employers, public and private, deal with employee communications particularly in states with privacy provisions in their constitutions.

In the wake of these issues, employers should update workplace policies and decide what level of monitoring of employee communications is appropriate for their circumstances. In most instances, employers should think about clearly stating that text messages and information posted about employees on social networking sites are not private, may be accessed by the employer at any time, and if inappropriate may result in disciplinary action against the originator of the offending information.

Additionally, employers must take steps not only to fully understand their obligation to retain and produce electronic communications during litigation, but also ensure that, if they allow work-related text messaging, a mechanism exists to preserve such information if necessary.

For more information, please contact Paul Garry, Erika Dillon or any other MBT labor and employment lawyer at (312) 474-7900.

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