GONZALEZ SAGGIO HARLAN

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Jill Pedigo Hall, Esq.

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Workplace Privacy: Becoming An Oxymoron?

By Jill Pedigo Hall, Esq.

The proliferation of technology in the workplace has significantly assisted employers in conducting workplace surveillance and monitoring. Employers now have the capability to monitor electronic and telephone communications, employee locations and activities, and even computer key strokes. A majority of employers monitor their employees to varying extent for differing purposes.[1] Some employers are motivated by their concern over safeguarding confidential information and their awareness of the increasing role of employee electronic communications and activities in creating employer liability. Employers may also believe monitoring is a useful tool in tracking and improving worker productivity. The question implicated by this extensive employer monitoring is that if workplace surveillance is somewhat unlimited, what employee workplace privacy remains?

Currently, there are few regulatory limits on workplace monitoring and surveillance, with the exception of federal wiretap statutes and state law. The Electronic Communications Privacy Act of 1986 regulates monitoring of electronic communications, but it contains several exceptions applicable to the workplace that ultimately do not hinder employee monitoring. Although some state laws have a common law right to privacy, the effectiveness of the laws at limiting what employers can monitor can be debated.

This year, the U.S. Supreme Court is expected to provide more definition as to the scope of employee workplace privacy in its first case dealing with employer monitoring of employee electronic communications. The Court has set oral argument for

April 19, 2010, to review the Ninth Circuit's 2008 decision on employee electronic privacy in *Quon v. Arch Wireless Operating Co*. (Case No. 08-1332, *City of Ontario v. Quon*). While *Quon* concerns the scope of privacy rights afforded to public employees under the Fourth Amendment, because the privacy standards applicable to public sector and private employers are significantly similar, the Supreme Court's decision may provide important guidance to all employers. The key question to be considered by the Court is whether a public employee had a reasonable expectation of privacy in text messages transmitted on his employer-issued pager. Because many state common law privacy determinations also turn on the existence of a "reasonable expectation of privacy," private employers should pay attention to the underlying facts in *Quon* that led to the Ninth Circuit's ruling.

In *Quon*, the Ninth Circuit held that the City of Ontario Police Department violated a SWAT officer's reasonable expectation of privacy by reviewing the content of his personal text messages sent with his department-issued pager. The decision rested on the fact that, while the City of Ontario's formal policies expressly stated that employees had no privacy expectations in communications made on the pagers and that the city could monitor those communications, a non-policymaking lieutenant had announced and followed an informal policy that allowed for personal use of the pagers. The lieutenant told the SWAT officers that their text messages would not be read if they paid any overages. The Ninth Circuit found that the lieutenant's informal oral policy countermanded the formal policy and created a reasonable expectation of privacy in the text messages.[2]

It is expected that the Court may provide guidance on how "operational realities" in the workplace, such as informal policies and policy enforcement, combine to set employee privacy expectations. The Court may find that the "operational realities" such as unique employer needs or functions make unreasonable any employee expectation of privacy. Conversely, the Court may find that an employer's failure to consistently enforce its electronic communications policy is an "operational reality" that creates a reasonable expectation by employees that a monitoring or other no-privacy policy will not be applied to them. The Court's decision may give an indication of the probability of success of future workplace privacy claims.

For all employers, the Supreme Court's acceptance of the *Quon* case flags a need for employers to have a renewed focus on ensuring that all employee monitoring is done consistently and in accordance with policies. Additionally, employer policies dealing with electronic communications in the workplace should be sufficiently encompassing and flexible to keep pace with changing technology. The Court's decision in *Quon* is expected before the end of June 2010.

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[1] A 2007 study by the American Management Association found that 66% of employers monitor Internet connections; 45% of employers track computer content, keystrokes, and time spent at the keyboard; and 43% of employers monitor employee e-mail.

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[2] For more factual background on *Quon*, please see Philip Holloway's November 12, 2008 60-Second Memo, "Do Employees Have a Reasonable Expectation of Privacy With Respect to Text Messages?", available at www.gshllp.com.