

# Employer • Alert

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## **READING EMPLOYEE TEXT MESSAGES – A CAUTIONARY TALE**

Employer's review of electronic messages invaded employee privacy, even though there was a warning that it could check its systems. Its enforcement practices gave the impression that messages might be private.

### **Electronic privacy may be found despite a policy to the contrary**

As the use of employee communications such as text and instant messaging continues to explode in the workplace, employers need to be increasingly cautious about monitoring such messages to avoid invading employees' privacy rights. Up until recently, employer policies warning employees that such systems may not be used for personal messages and that the employer reserves its rights to monitor were upheld in court. Recently, however, a federal appeals court in California decided that because of the way a particular monitoring policy was administered, the warning was inadequate and the review of employees' text messages violated employees' rights to privacy. As a result, all employers should be careful that the policies are properly written and administered.

A recent example of the problems that can arise was encountered by a California police department that had distributed text messaging pagers to its employees. The City adopted a policy that limited the use of City equipment to business related purposes. It disseminated this policy to its employees and advised them that the use of such tools for personal matters was a significant violation of policy. The policy also emphasized that employees should have no expectation of privacy or confidentiality when using these resources. The employees were told that the City would monitor all computer activity, including e-mail and Internet use, with or without notice. When the pagers were distributed, employees were again notified that the same equipment usage policy applied.

The Police Chief assigned a lieutenant to monitor the usage of the pagers. The lieutenant developed his own informal practice in carrying out this task. Employees, who exceeded the maximum number of characters in a month, were required to pay for extra charges. He did this without looking into the reason for the extra charges.

As employees were exceeding the monthly limits, the Chief decided to review the usage to be sure that the maximum limit was appropriate and to determine whether employees were sending personal messages. The department obtained and reviewed messages and found a large number of personal messages, including some that were sexually explicit.



Employees whose messages were read sued alleging that their right to be free from unreasonable searches and seizures had been violated. The Court of Appeals found that the employer's policy restricting personal use had been compromised by the practice of allowing employees to pay the overage charges. Even though this practice was not authorized or approved by the Chief or the City, it created a "reasonable expectation" of privacy. For the court, this practice made the written policy unenforceable.

The court also faulted the procedure adopted by the City to inspect the transcripts. It found that reading the text messages was an unreasonable search. The review intruded upon the employee's privacy, even though there was a legitimate purpose for doing so. The court noted that there are limits on searches and identified several alternatives to collect the information that the Chief needed without reading the text. While it was reasonable to determine to what extent the number of characters had been exceeded and whether the messages were work related, reviewing the content of the communications exceeded what was permissible.

For employers who distribute equipment that can send and receive e-mails, instant messages or electronic text, there are steps that need to be taken before seeking to control how employees may be spending their work time. The adoption of a policy on the usage of electronic equipment is the first step. Making it clear that there should be no expectation that what is sent and received is private is important. But it is essential to go beyond merely adopting a policy, it must be consistently enforced. Supervisors must understand that they cannot create their own procedures for monitoring and/or enforcing the policy as that may create an impression that the messages will not be reviewed.

It is also important to consider whether a "reasonable" usage policy makes sense as opposed to an absolute ban on personal usage as employees are tied by these devices to the work place at virtually all times of the day and night. To the extent that there are concerns about employees incurring non-business related costs by their excessive use of instant messaging, then there are alternative ways to address these issues that do not involve reading the messages. Employees can be made personally responsible for any charges over a set limit. While that addresses the cost issue, it does not address the productivity issue, concerns that confidential information is being sent outside the company, or employees using personal e-mail accounts during working time. Clear rules on such matters are necessary and particular vigilance is needed to safeguard an employer's confidential information and compliance with work place rules.

## QUESTIONS OR ASSISTANCE?

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