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Employment Practices Alert

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Insights for Employers

Supreme Court Rules Police Department Did Not Violate Officers Fourth Amendment Rights By Reviewing Paged Messages

Officers in a city police department were given pagers for use while on duty. The department contracted for a flat fee paging service, which allowed up to a certain number of alphanumeric characters to be sent each month. After a number of officers exceeded their limit for several months, the department's chief sought transcripts of the paged messages to determine if officers should be required to pay overages for personal usage, or if the department should increase the monthly limit to accommodate increased work-related messaging. The transcripts revealed that certain officers were using the pagers to send sexually explicit messages. An internal affairs investigator redacted the transcripts to include only those messages sent while the officers in question were on duty. The investigation revealed that the officers were using pagers for personal business while on duty. After the officers were disciplined for violating department policy, the officers filed suit, alleging that the department violated the officers' Fourth Amendment rights and the federal Stored Communications Act (SCA). The district court held that the officers had a reasonable expectation of privacy concerning the content of the paged messages, but ultimately granted summary judgment in favor of the department on the basis that the chief's investigation was for a legitimate work-related purpose. The U.S. Court of Appeals for the Ninth Circuit reversed, holding that the search was not reasonable under the Fourth Amendment, even if for a legitimate purpose. The U.S. Supreme Court took up the case and reversed the Ninth Circuit, holding that the search was reasonable.

This decision should not be broadly interpreted. The Court did not address whether officers did, in fact, have a reasonable expectation of privacy in the paged messages. Instead, the Court said it had to proceed with care when considering the concept of privacy expectations in communications made on electronic equipment owned by a government employer. It pointed to rapid changes in the dynamics of communication and information transmission and was uncertain how workplace norms and the law's treatment of them would

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Service Areas

Employee Benefits

Immigration

Labor & Employment

evolve, saying “[t]he judiciary risks error by elaborating too fully on Fourth Amendment implications of emerging technology before its role in society is clear.” Rather, the Court assumed for purposes of its opinion that a reasonable expectation of privacy existed, but nonetheless held that the department’s review of paged messages was less intrusive than a review of the officers’ email accounts, or tapping of the officers’ phones. Though the Court ruled against the officers in this case, it seems clear that overly intrusive searches of electronic communications could run afoul of the Fourth Amendment, even when an employer has a legitimate purpose in reviewing those communications. Public employers must take care to ensure that searches of electronically stored communications are done in a reasonable way to achieve a limited and legitimate business objective.

City of Ontario v. Quon, No. 08-1332 (S. Ct. June 17, 2010)

Supreme Court Rules Two-Member NLRB Lacked Authority to Issue Rulings

On December 20, 2007, the National Labor Relations Board’s (the “Board”) four members delegated all of the Board’s powers to a three-member group. The Board took the action knowing that the recess appointment of one member of the three-member group was about to expire at the end of the year. By delegating authority to the three-member group, however, the Board believed the two remaining members would still have a quorum and have the ability to render decisions and orders. In September 2008, the two-member Board issued a ruling in a case involving unfair labor practice claims brought by a union against a company. The two-member Board held that the company committed unfair labor practices by repudiating a collective bargaining agreement with the union and by withdrawing recognition of the union. The company challenged both the merits of the Board’s decisions and the authority of the two-member Board to issue the rulings. The U.S. Court of Appeals for the Seventh Circuit held that the plain meeting of Section 3(b) of the National Labor Relations Act (NLRA) gives the Board the power to delegate its authority to a group of three members. The Seventh Circuit further held that Section 3(b) allows the Board to continue to conduct business with the quorum of three members, but expressly provides that two members of the Board constitutes a quorum where the Board has delegated its authority to a group of three members. The Seventh Circuit also affirmed the Board’s findings that the company committed unfair labor practices.

On June 17, 2010, the U. S. Supreme Court issued a ruling holding that the two-member Board did not have the authority to issue decisions in unfair labor practice and representation cases. The Court found that Section 3(b) of the NLRA requires that when the Board delegates its authority to a three-member group, the group must maintain a membership of at least three in order to continue exercising the delegated authority. The Court stated that this interpretation gives effect to all parts of Section 3(b), including the three-member quorum requirement, and is consistent with the Board’s long standing practice of reconstituting three-member groups when one member leaves the Board. The Court’s holding potentially impacts nearly 600 rulings issued by the two-member Board between early January 2008 and late March 2010. Currently there are five other cases pending in the Court and about 70 cases pending in the federal appeals courts challenging the validity of two-member rulings. It is anticipated that the remaining cases raising the issue of the two-member Board’s authority will be remanded to the Board for further consideration and resolution by the current four-member National Labor Relations Board.

New Process Steel LP v. NLRB, No. 08-1457 (S. Ct. June 17, 2010)