

## Employment Law Updates

By [Robert M. Howie](#)

### U.S. Supreme Court Gives Public Employer the Green Light to Search Employee's Text Messages

Employers can take heart that the U.S. Supreme Court has upheld the right of a public employer to conduct a search of an employee's text messages on a company-owned pager. The Court ruled that the search in this case was reasonable because it was motivated by a legitimate work-related purpose (concern about abuse of text messaging) and was not excessive in scope. While private employers are not directly affected by this constitutional decision, it sends a strong signal that all employers have wide latitude to monitor and/or search electronic messages sent via company-provided devices.

The case involved Jeff Quon, a police officer for the City of Ontario, California. The City had provided its employees with pagers that included text messaging capability. While the City had a computer use policy reserving the right to monitor e-mail use and reminding employees that there was no expectation of privacy when using the company's resources, that policy did not explicitly cover text messages. In addition, a supervisor advised Quon that if he exceeded the monthly character limit for text messages, he could pay the overage. Nonetheless, after several months of high text message usage over the limit, the City decided to determine the reason for the excess usage. The City obtained the messages and found that Quon's messages were not work-related, and indeed were sexually explicit. The City disciplined Quon. Quon, his wife and his mistress all sued the City alleging that their rights under the Fourth Amendment were violated.

The Supreme Court ruled unanimously that the City had the right to conduct the search of Quon's text messages. While the Court sidestepped the question of whether Quon had a reasonable expectation of privacy in his text messages sent over his business pager (the Court assumed that he did), the Court had little difficulty determining that the search was reasonable. There are several important lessons for employers (both public and private):

- Make sure that your electronic communications tools/computer usage policy covers all of the tools and devices that you provide to staff (e-mail, Internet, PDA, text messaging, pagers, etc.);
- Don't make promises that any business tools are "off limits" to monitoring or searching;
- Make sure that all monitoring and searching of electronic communications tools is done pursuant to a legitimate business purpose; and
- Be consistent in your enforcement of rules relating to electronic communications tools.

## U.S. Department of Labor Clarifies (and Expands) Definition of “Son or Daughter” for Purposes of FMLA Leave

Employers covered by the federal Family and Medical Leave Act must provide up to 12 weeks of leave for the birth or placement of a child, to care for a newborn or to care for a child with a serious health condition. A child includes a biological, adopted or foster child, a stepchild, a legal ward, or a child of a person “standing *in loco parentis*.” Existing federal regulations define *in loco parentis* as including those with day-to-day responsibilities to care for and financially support a child. The Department of Labor has recently issued an Administrator’s Interpretation advising employers to broadly interpret the concept of *in loco parentis*. The Department contends that employees need not show that they provide both day-to-day care and financial support in order to stand *in loco parentis* to the child and thus be entitled to FMLA leave. Importantly, the Department also states that neither the FMLA nor federal regulations restrict the number of parents a child may have under the FMLA (a child might have four or more parents). As a result of this interpretation, a variety of individuals could be considered *in loco parentis* and thus eligible for leave to care for a child:

- An employee who takes in a grandchild and assumes ongoing responsibility for raising the child because the parents are incapable of providing care;
- An employee who assumes responsibility for raising a niece after the death of the child’s parents; or
- An employee who provides day-to-day care or will share equally in the upbringing of the child of an unmarried same-sex or opposite-sex partner, even if the employee does not financially support the child.

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If you have any questions about this newsletter, please contact the author listed above or the Riddell Williams attorney with whom you normally consult.

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*Upcoming RW Presentation –  
Learn More About Health Insurance Reform!*

### **A Guided Tour Through the Jungles of Health Care Reform and IRC Section 409A**

**Breakfast Briefing  
June 29, 2010 at 7:30 a.m.**

Conducted by our Health Care Group and Corporate Group

This briefing will be useful for anyone with responsibility for employee benefits and/or employee compensation arrangements. If you’d like more information or would like to sign up, please click here: [Breakfast Briefing Information](#).

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