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US Supreme Court Favors Employers in Three Recent Decisions

Supreme Court Holds That Government Employer's Search of Employee's Text Messages on Company Pager Was Reasonable Under the Fourth Amendment

On June 17, 2010, the US Supreme Court released *City of Ontario v. Quon*, in which the Court (in a unanimous decision, with Justice Scalia concurring) reversed the Ninth Circuit's decision and held that a government employer's search of employee text messages was reasonable under the Fourth Amendment.

In *Quon* the police department asked a private company to release an employee's full text messages due to overuse of the approved texting plan. The department wanted to ensure that its texting plan was sufficient and that employees were not paying for work-related overages. It was discovered that most of the messages sent by Quon were personal and several were inappropriate, resulting in employee discipline. The Ninth Circuit held that this violated the Fourth Amendment because viewing the full text of the messages was not necessary to address the aim of the search. In reversing, the Supreme Court held that because the search of Quon's text messages was reasonable the police department did not violate Quon's Fourth Amendment rights.

The Court did not address whether the employees had a reasonable expectation of privacy in the text messages

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and assumed for the purpose of appellate review that the employee did. Nonetheless, the Court held that the search was permissible because the purpose and scope of the search were reasonable. In so noting, the Court emphasized the continuous changes in technology advancements for employers and the fact that, in this case, the search was initiated for a work-related matter. The Court also held that looking at the full messages was not "excessively intrusive" partially because the employer only viewed a sample of the messages that were sent while Quon was on duty.

While *Quon* seems to give employers some leeway for searches, it is unlikely to be the Supreme Court's last word in this developing area. It remains important for employers to restrict searches of employee information to situations where there is a reasonable work-related purpose. The case also highlights the importance of maintaining a current electronic information privacy policy. For such a policy to remain effective, it should be reviewed and updated as new technology is introduced into the workplace.

National Labor Relations Board: Two-Member NLRB Panel Lacked Authority to Issue Decisions

Also on June 17, the high court issued an opinion in *New Process Steel, LP v. NLRB* holding that the NLRB was not authorized to issue two-member panel decisions when the Board operated with only two of its five members from January 2008 to late March 2010. The Court concluded that the NLRB must at all times maintain a membership of at least three in order to exercise its authority under the National Labor Relations Act and "if Congress wishes to allow the Board to decide cases with only two members, it can easily do so."

The ramifications of the Supreme Court's decision in *New Process Steel* should have little to no effect on future cases heard by the NLRB since President Obama has made two recess appointments to the Board, increasing the NLRB's number from two to four. However, the Court's decision will have major ramifications on nearly 600 cases previously decided by the two-member Board over the past two years. In fact, the NLRB has already issued a press release stating:

> The same question has been raised in five more cases pending before the Supreme Court, and 69 that are pending before the Courts of Appeals. It is expected that those cases will be remanded to the Board, and the now-four member Board will decide the appropriate means for further considering

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and resolving them.

In addition to cases pending appeal, there remains the more difficult question of what happens to cases that are final and whether the Board's apparent lack of subject-matter jurisdiction to render decisions over the past two years will revive these cases.

Employers should take note of any decisions that were of particular interest during this time period to ensure that the outcome remains the same.

The Supreme Court Continues to Slam the Door on Employee Challenges to Arbitration Agreements

On June 21, the Supreme Court issued a 5-4 decision in favor of the employer in *Rent-A Center, West, Inc. v. Jackson*. The issue before the Court was whether, under the Federal Arbitration Act (FAA), a district court may decide a claim that an arbitration agreement is unconscionable, where the agreement explicitly assigns that decision to the arbitrator. The Court concluded that the answer to the question depended on what type of challenge is made to the validity of the agreement.

In *Rent-A Center*, Jackson sued his former employer for employment discrimination under 42 USC §1981. The employer, Rent-A-Center, then filed a motion under the FAA to dismiss the proceedings and compel arbitration. The district court granted the employer's motion, but was later reversed by the Ninth Circuit Court of Appeals. The Supreme Court ultimately reversed the Ninth Circuit, compelling arbitration in favor of the employer.

Writing for the majority, Justice Scalia explained that where an arbitration agreement contains a clause where the parties have agreed that the arbitrator will also decide any "gateway" issues of enforceability, any challenges to the validity of this particular clause (or agreement) must be decided by the district court and any challenges to the enforceability of the agreement as a whole should be decided by the arbitrator. According to the majority, the provision within the agreement requiring gateway issues of enforceability to be decided by an arbitrator is simply a separate and additional agreement to arbitrate and a district court will intervene only when the challenge of enforceability is directed specifically at the agreement to arbitrate gateway issues. All challenges to other provisions of the agreement, or to the agreement as a whole, are within the domain of the arbitrator.

After determining the correct legal standard, the Court

concluded that the employee challenged only the validity of the arbitration agreement as a whole, rather than the specific agreement to arbitrate the gateway issues. As a result, the Supreme Court ruled in favor of the employer and compelled arbitration.

This decision furthers the Supreme Court's recent pro-arbitration push and continues to cut away at employee attacks on arbitration agreements.

For further information regarding these decisions, please contact your principal Squire Sanders lawyer or one of the individuals listed in this Alert.