



## Employment Auditor's Notepad

### COMPANY CELL PHONES – CAN YOU MONITOR TEXT MESSAGES?

The U.S. Supreme Court issued an opinion in *Quon v. Arch Wireless* which sheds light on when an employer can monitor an employee's use of electronic devices such as company cell phones. The Court considered whether the city of Ontario had violated the privacy rights of a police officer, and the other officers he texted when, as part of an audit of overage text charges, the Ontario Police Department read the messages which Quon sent on his city-issued pager.

Court held that the department's investigation of the text messages was reasonable. The investigation was motivated by a legitimate purpose: the work-related purpose of ensuring that the city's text message limit was sufficient to meet the city's needs. Additionally, the investigation was not considered excessive in its scope because reviewing the messages was "an efficient and expedient way to determine whether Quon's overages were work-related or due to his personal use."

While there are circumstances which justify text message monitoring, employer should proceed with caution and have outside counsel evaluate whether the monitoring constitutes a violation of privacy.

### *New U.S. Department of Labor Interpretation*

#### DONNING AND DOFFING – WHEN YOU MUST PAY EMPLOYEES TO GET DRESSED

The U.S. Department of Labor has issued a new Administrator Interpretation. An interpretation is not the same as an official regulation, but it gives employers an idea as to how the Department will enforce its laws. The most recent letter issued addresses "donning and doffing," which is an employee's changing of clothes or gear before or after the workday. Generally, if the gear or clothing used by the employee is considered necessary for the job, the time spent in donning and doffing is compensable, and the employer must pay for this time and consider it in calculating overtime wages. Section 203(o) of the Fair Labor Standards Act covers this guideline.

In its new opinion letter, the Department of Labor advised that employees must be compensated for the time spent donning and doffing "protective equipment worn by employees that is required by law, by the employer, or due to the nature of the job." The Department cited the example of meat packing employees putting on protective clothing or gear such as smocks, arm-guards, or gloves. In other words, the time spent putting on and taking off these articles must be considered hours worked by the employer. This is a more liberal interpretation: the Department's previous position was that only clothing, not protective gear, fell under the donning and doffing guidelines.

The Department of Labor then went a step further. It stated that changing clothes or gear, even if not compensable, may be considered a "principle activity" if changing is integral to the job. When changing is considered a "principle activity," it starts the workday. Thus, the activities that follow are also part of the workday and are compensable, even if they would not be compensable in and of themselves. For example, if changing clothes is a principle activity, then walking from the locker room to the work area is also compensable under this new opinion.

The latter portion of this opinion letter regarding principle activities is highly significant in industries where employees change their clothes at the beginning and end of the shift, even where they do not necessarily wear "protective clothing" or equipment. That is because time that would otherwise not be compensable might otherwise become so if the clothes-changing is deemed a "principle activity."

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