



U.S. Supreme Court Reverses Ninth Circuit on Text Message Searches

Public employers who worry about monitoring employee texting and emailing will finally see some relief in the U.S. Supreme Court's opinion in *City of Ontario v. Quon*, which was issued today. Private employers who have the same worries will also find the decision useful, even if the Constitutional analysis does not apply in their workplaces.

The Ninth Circuit had concluded that the City of Ontario violated the privacy rights of one of its SWAT team officers when it read some of the text messages he sent on City-owned equipment during his work hours. The Supreme Court, however, concluded that this search was reasonable.

The City of Ontario, California had provided alphanumeric pagers for employees on its SWAT Team, including Sergeant Quon, and purchased a service contract that allowed a set number of text characters per month. There was no pager policy, but the City had a general computer usage, internet, and email policy. The policy told employees to limit their use to City business. It also reserved the right to monitor and log all network activity including email and internet use, and the City announced that it intended to treat text messages the same as email. At the same time, however, department management said that there would not be an audit of text messages if employees paid for any overage charges. After a few months the department got tired of collecting overage charges and audited the messages to determine whether the existing character limit was too low for work-related messages. The audit revealed that many of the messages sent and received on Quon's pager during work hours were not work related and some were sexually explicit.

Quon sued the City, alleging that it had violated his Fourth Amendment rights by auditing his text messages; the Supreme Court concluded that the audit was reasonable.

Public employers cannot rely on the opinion to determine what is, and is not, a reasonable expectation of privacy in the workplace. Among other things, the Court recognized that the swift development of communications technology makes it hard to talk about those kinds of expectations. But it IS possible to talk about whether a search is reasonable, and that is where the Court rested its decision. This is the analysis that employers should study.

Two things were key to finding the search reasonable:

- First, the search was justified at its inception because there were reasonable grounds for suspecting that it was necessary for a non-investigatory work-related purpose that is, whether employees were actually paying work-related overages out of their own pockets or whether the City was paying for excessive personal communications on City-owned equipment.
- Second, the scope of the search was reasonable since the City only audited two months of transcripts (despite many months of overages) and only reviewed messages sent or received when Quon was on duty.

The opinion is good guidance to employers who do investigations, audits and searches. Not surprisingly, reasonable employers always do better than unreasonable employers, especially when they stand in front of the highest court in the country. Where searches like this are concerned, smart employers ask first: why am I doing this search? That helps define the business or work-related purpose. If there is not a good explanation, think twice about whether to proceed. Smart employers who do searches like this should also ask: how can we limit the scope so that we are looking at enough to answer our questions, but not so much that we are overstepping? When the City of Ontario reached the Supreme Court, its ability to provide good answers to these questions saved the day.

From Barran Liebman LLP

In this issue

U.S. Supreme Court on Text Messages

U.S. Census Jobs cut Unemployment Rate for May

BOLI on Credit Histories

WWCEC Scholarship Program

What does your employer know about you?

NW perceptions on immigration

Questions? Comments? Suggestions? Would you like to submit a piece to the Westside LINK newsletter?

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Hiring of Temporary Census Workers account for 95% of May nonfarm Job Increase

Employers added 431,000 workers to payrolls in May according to the Bureau of Labor Statistics more than the 290,000 jobs added the previous month but far below analysts' forecasts for a gain of up to 600,000 jobs. The report showed that 411,000 temporary Census Bureau workers were hired last month-in line with expectations-helping to lower the unemployment rate to 9.7 percent from 9.9 percent in April. Short-term census positions also boosted employment during March and April by a total of 114,000 jobs. In the private sector, however, businesses increased payrolls by only 41,000 jobs last month, down from 218,000 in April and the fewest since January, when they added 16,000 jobs. State and local governments, meanwhile, shed jobs.

From NASWA



BOLI Issues Final Rules for Employer Use of Credit Histories

The Oregon Bureau of Labor and Industries (BOLI) has issued final rules to prohibit employment discrimination on the basis of information contained in an applicant's or an employee's credit history. The credit check ban will go into effect July 1, 2010, and includes only limited exceptions to the prohibition on employers from using or obtaining credit history information for employment purposes.

Substantially Job Related - Employers may obtain or use information contained in an individual's credit history if the credit history information is "substantially job related." While the statute does not elaborate on what is "substantially job related," the final rules provide a definition.

The final rules advise that whether credit history information is "substantially job related" must be evaluated with respect to the position for which the individual is being considered or holds. The rules state that credit history information is "substantially job related" if:

1. "An essential function of the position at issue requires access to financial information not customarily provided in a retail transaction that is not a loan or extension of credit." ("Financial information customarily provided in a retail transaction" includes, "information related to the exchange of cash, checks and credit or debit card numbers.")
OR
2. "The position at issue is one for which an employer is required to obtain credit history as a condition of obtaining insurance or a surety or fidelity bond." While the proposed rules provided a list of types of positions which may meet the "substantially job related" test, the final rules do not include similar guidance so employers will be left to make a case by case determination whether a position fits within the exception.



Notice - To rely upon the "substantially job related" exception, an employer must provide written notice to the applicant or employee disclosing the reasons for the use of credit history information. The employer bears the burden of proving that it made such a disclosure.

WHAT EMPLOYERS SHOULD DO:

- Rely on the "substantially job related" exception conservatively. If you are unsure if a position meets the exception, do not require a credit history for any applicant or employee in the position at issue after July 1, 2010.
- If you will be relying on the "substantially job related" exception, prepare a disclosure form that can be customized for each individual and position at issue. Clearly state the reasons for the use of credit history information, tying the explanations to the specific essential job functions of the position.
- Retain a copy of the written notice for each applicant or employee that you obtain credit history information for, even if you do not actually use the information.
- Be consistent. If you rely on an exception, require credit histories for all applicants and employees with the same essential functions.
- Update your employee handbook, stating that you do not discriminate on the basis of information in an applicant's or an employee's credit history.
- If you use a third-party service to conduct background checks, discuss the new Oregon law with them and instruct them (in writing) not to use or obtain any credit histories when conducting background checks unless expressly requested for a particular individual.

From Barran Liebman LLP

WWCEC's 2010 Scholarship Program

The WWCEC will be awarding three \$1000 scholarships in June as we continue our commitment to Washington County. WWCEC believes that is important to participate in the growth of our community's workforce. The goal of this scholarship is to offer training opportunities to individuals who are employed, reside or are students within Washington County.

Please join us at our scholarship presentation on Friday, June 25th at 8:30 am at the PCC Willow Creek Center at 241 SW Edgeway Drive in Room 109. We will be awarding our scholarships to Christina Svelund who will be attending PCC to obtain her Accounting degree, Victoria Sanders who currently attends NW College of Beauty pursuing her Cosmetology license and Suzanne Lewis who attends PCC pursuing her degree in Graphic Design.

For more information regarding our Scholarship Program contact Marti Spinks at 503-526-2706 or at Marti.E.Spinks@state.or.us.



What Does Your Employer Know About YOU?

Dear Annie: I had a strange experience the other day: I went to a second round of job interviews at a company where I'd really like to work, and a manager there mentioned that he, too, is a fan of a little-known science fiction writer whose books I happen to like. That was nice, since it gave us something in common besides work, and we had a pleasant conversation. But it dawned on me later that the only way he could possibly have known I liked this writer was, if he had seen my "wish list" on Amazon.com. Is that something employers usually look at? It seems weird. And if they're looking at that, what else are they looking at? -Creeped Out

Dear Creeped Out: The good news is, this company seems to be seriously interested in hiring you, because they've apparently bothered to do -- or, more likely, paid someone else to do -- what's called a deep-Internet search, to glean every scrap of information about you they possibly can. The not-so-cheery news is, they might know a lot more about you than you realize.

The so-called deep Internet (also known as the Deepnet, the invisible Web, or the dark Web) is not new, but enterprising techies have recently come up with ever more sophisticated algorithms for trolling its vast contents. To get an idea of the size of the deep Web, consider: Researchers estimate it's more than 500 times the size of the everyday Internet you can see with an ordinary search engine. Someone adept at deep-Web diving can find information in databases that have blocked traditional search engines, as well as certain kinds of multimedia files and other formats Google can't reach -- including Web pages unlinked to any other pages, data from password-protected sites, and much, much more.

Is it creepy -- or understandable -- that some employers do deep Web search on job candidates? In practical terms, says Lori Fenstermaker, CEO of online recruiters AutoSearch, this means that "Amazon wish lists can crop up. So can your results from the last marathon you ran, and whose political campaign you've given money to, and whether your house is in foreclosure." Ever filed an application for a patent? Declared bankruptcy? Fallen behind on your child-support payments? Been investigated by the Securities and Exchange Commission? A Google (GOOG, Fortune 500) search probably won't reveal any of that, but a deep-Web search could.

"Another thing is, every blog comment you ever posted is liable to show up," says Fenstermaker. "People really should think twice before putting up nasty posts on blogs, especially if they are long enough that you obviously put some thought into them, because employers look at people who seem chronically angry or who can't disagree in a civil way. It's a definite red flag." Indeed, hiring managers often look for any negative mentions of a past or present boss or employer, says Jonathan Schreiber, senior vice president of business development at Pipl, a company that specializes in conducting deep Web searches for recruiters and Fortune 500 companies. "If you're sending Tweets to your friends bashing the company where you work or used to work, that will turn up," he says. "We don't tell employers who to hire or not hire, we just provide the data, but many of them see that as a deal breaker."

It's not hard for employers to have these types of searches conducted, either. Pipl, which techie blog TechCrunch.com once described as "a search engine so good, it will scare your pants off," will generate a report on a candidate's deep-Web presence for free, if an employer does just a few per day. For huge clients that may want thousands of searches on a regular basis, fees range from \$7,500 to \$10,000 a month.



Still, the searches only go so far. "Our searches don't intrude into anything you have designated as private," Schreiber says. "If you have set your privacy controls on Facebook to allow only friends to see your information, for example, we don't go beyond that barrier. It wouldn't be ethical." Likewise, secure sites like bank accounts are off limits, he says. Even so, says Schreiber, "most people have put a lot more data out there, in various places, than they realize. Blog comments, for instance, seem 'anonymous' to many people because they think the Internet is so vast, how could anyone find that? But the fact is, an employer who does a Pipl search finds a lot more than just your LinkedIn profile. They're looking at a pattern of online behavior that can reveal your whole personality."

For anyone who suspects there's some dirt on them in the deep Web they'd prefer employers not to see, all is not lost. There are online services that will dig it up and expunge it, for a modest fee. They'll also monitor the deep Web, and alert you if anything new crops up. Reputation Defender, the first and biggest of these outfits, charges around \$15 a month to keep your deep-Web image squeaky clean. "Control of your digital information, your online self, is a problem that is getting bigger every day," says Michael Fertik, who started Reputation Defender in 2006. The company now has customers in 45 countries. "Our research shows that about 14% of employers now are even delving into really obscure parts of the Internet, like virtual worlds" -- evidently on the dubious assumption that your World of Warcraft avatar reveals something about you that an interviewer needs to know.

Note to hiring managers: Before you embark on a deep Web search (or hire someone else to do it), have a word with your company's attorney. Peter Gillespie, an employment lawyer at Fisher & Phillips in Chicago, discourages his corporate clients from deep Web diving. Why? "You run too big a risk of finding out something you would not be allowed to ask in an interview," he says. For instance, hiring managers are prohibited by law from asking if an applicant has ever had cancer. What if a deep Web search reveals his or her membership in a cancer survivors' support group? "Are you going to be able to put that completely out of your mind?" says Gillespie. "What if you decide not to hire this person for some other reason, but he or she hits you with a lawsuit claiming it was an ADA (Americans with Disabilities Act) violation?"

He adds: "HR departments have policies in place that are carefully designed to stay within the law, so stick with those." If that approach seems outdated, Gillespie points out, "bear in mind that employers were somehow able to make perfectly good hiring decisions before the Internet even existed."



Northwest Perceptions on Immigration

A new public radio survey shows a majority of Northwest residents believes illegal immigrants take away jobs from native-born Americans.

Is that perception based on fact? Some experts say, right or wrong, people's beliefs are sometimes driven by their fears about their own economic well-being. Correspondent Doug Nadvornick has more findings from our public radio poll. If you want to see the results of America's long open-door policy toward immigration, go to the line in the grocery store. Look around this Spokane Safeway; you see a mixture of ethnicities here.

Pollster Adam Davis says most of the people included in the recent public radio survey think highly of immigrants, even those who are here illegally. The survey is a collaboration of the Northwest Health Foundation, the polling firm Davis, Hibbits & Midghall and Northwest public radio stations.

1,200 people from Oregon, Washington and Idaho participated.

Davis says 73 percent think undocumented immigrants are good people trying to do the best they can.

Adam Davis: "They're here under tough circumstances. They work hard. But...it's the big but...they feel these people are taking jobs away from legal residents." Davis says about three-in-five of those surveyed believe that. They include Barbara Brewster, who lives at Mountain Home Air Force Base in southern Idaho. Barbara Brewster: "Somebody wants to come here legally, I have no problem with that. But when they're coming here illegally, they're breaking the law. They should go back and come back the right way."

Robert Shapiro says the idea that illegal immigrants steal jobs from Americans is simply incorrect. Robert Shapiro: "That certainly is not what the data show." Shapiro works at the left-leaning think tank NDN. He recently reviewed about 20 studies that he says examine links between immigrants and the economy.

The consensus among them, he says, is that immigration as a whole has had a net positive effect on the economy. Robert Shapiro: "The American economy is large enough to absorb huge numbers of immigrants without much effect, frankly. And don't forget that they increase the supply of workers, but they also increase demand because they bring demand with them."

Steven Camarota from the non-partisan Center for Immigration Studies agrees that illegal immigrants don't influence the larger economy much. But he says they do sway smaller pockets of the economy. Steven Camarota: "Illegal immigration probably has very little impact, if any at all, on the labor market prospects for about 80 percent of American workers. But, for the 20 percent at the bottom, it can have a significant impact."

People like teenagers and other low-skilled workers with little education. Critics of illegal immigration also point to the strain undocumented workers and their families put on local and state government services. 58 percent of the people in our survey think the children of illegal immigrants should not receive state government benefits. About the same numbers even say those children should be deported back to their parents' home country.

But, others in the survey think undocumented workers fill a valuable role in the regional economy. Dianne Childress also lives in Mountain Home, Idaho. Dianne Childress: "I feel like they're doing the jobs that most Americans won't do, the menial labor and field work."

An overwhelming majority of respondents say they haven't lost a job to an illegal immigrant, haven't hired one, nor have they been the victim of a crime committed by one. In fact, says pollster Adam Davis, many report they have little to no interaction with undocumented residents. But they do have serious uncertainty about the economy...national, state and personal.

Adam Davis: "There's a lot of anxiety around jobs." And, for now, Davis says that's driving people's opinions about immigration.

From OPB Radio