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Recent Federal Case Reveals Potential Liability For Employers Based On Employee Cell Phone Usage

A recent federal appellate court decision raised significant issues that could affect employers who provide communication devices to their employees. In *Quon et al. v. Arch Wireless Operating Co., Inc.*, the Ninth Circuit Court of Appeals in California allowed an employee and others to sue an employer and its telecommunication service provider. For some of the plaintiffs in *Quon*, the Ninth Circuit found that they were entitled to a judgment on their claims against the telecommunication service provider.

The factual situation in *Quon* is one common to many employers: an employee is provided with a wireless text-messaging pager by the employer to use for business purposes, the telecommunication services are maintained and paid for by the employer, and the employer wants to audit the employee's usage of the services. After the employer in *Quon* requested transcripts of text messages sent and received by the employee from the telecommunication service provider, the employer found that personal and sexual text messages had been sent and received by the employee. Based on the particular facts at issue in *Quon*, the Ninth Circuit allowed the employee *and persons who sent text messages* to the employee to sue the employer and the telecommunication service provider for various invasion of privacy-based and federal statutory claims.

Although the *Quon* decision is not directly applicable in Georgia and the Southeast region, the federal courts here may be persuaded by it. Indeed, the federal appeals court in Georgia has previously referred to the Ninth Circuit's decisions and analysis in a similar case.

While the *Quon* decision may cause significant concern for employers who provide communication devices to their employees and who pay for the service, the *Quon* decision does identify a number of efforts that employers can take to minimize their potential liability. Many of these efforts can easily be addressed in employee handbooks and usage policies.

If you need assistance with drafting a new handbook or usage policies, or if you would like to discuss the potential impact of *Quon* and other similar court decisions on your operations, please contact Aaron Chausmer, at achusmer@bfvlaw.com, or another attorney with Berman Fink Van Horn P.C., at (404) 261-7711.