

# What to Do About

# PERSONNEL PROBLEMS

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## CONTENTS

<b>Action Items</b> .....	2
Can Your Applicant Do the Job?	
<b>Questions From Our Readers</b> .....	3
'What Do I Do About This Tricky Situation?'	
<b>A Closer Look</b> .....	3
<b>Survey Says</b> .....	4

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## Put the Right Person in the Right Job

If you have one or several positions in your organization that require “heavy lifting”—our term for physical exertion—Teresa A. Long strongly suggests you conduct thorough physical examinations on candidates for those jobs. Long is director of injury management strategies for the Institute of WorkComp Professionals in Asheville, North Carolina.

“**What you don’t know CAN hurt you**” is the subtitle of a white paper Long has written on the topic. She offers this example of why those screening exams are so important: Let’s say you have an opening for a worker to pack and load heavy boxes onto trucks. “But what if the applicant shows up with two, good, strong arms and appears to be a perfect candidate for the job but has a history of back trouble that resulted in a

number of previous workers’ compensation claims,” Long asks. As an employer, you know that it’s illegal to ask about an applicant’s workers’ comp history.

You also know that you can’t test a candidate’s ability to perform that heavy-lifting job until you’ve already made a job offer to the person. In addition, Long notes, employers that routinely spent \$300–\$400 5 years ago for preemployment physicals, blood work, and drug testing are now likely to be more focused on finding money to fix the office copier. At the same time, no employer wants to inherit an existing injury when putting someone new on the clock, only to see that injury slightly aggravated in the line of duty—and then become totally responsible for that injury.

*(continued on page 2)*

## Monitor Employee Texts or Not?

The Supreme Court has agreed to hear a potentially significant case this year—one that could have far-reaching implications for employers. The issue: Did a California police department and its wireless provider illegally invade the privacy of one of its sergeants, and those with whom he corresponded, by accessing and reviewing all the text messages he sent on his department-issued pager?

**Here are the basics of the case.** Quon was a member of a SWAT team in the Ontario, California, police department. All members of the team were issued pagers in late 2001 and told to use them primarily for business and very little for personal messages. The department had a written policy in place regarding e-mail, but texting was never included. Furthermore, the wireless carrier limited users to a certain character count, but employees were allowed to disregard the

limit—as long as they paid the department back for their overage. Finally, and most important, the department never said that it would review users’ text messages.

Quon routinely went over the character limit each month but reimbursed the department for this use. Then came the decision at the heart of the case: Concerned that team members might be reimbursing the department for business-related messages—suggesting that the character limit was too low—officials decided to ask the carrier, Arch Wireless, to share Quon’s messages with them for review. Arch complied, and the department learned that a great many of Quon’s messages were personal and sent to his wife, his girlfriend, and a colleague. Worse still, many of them were sexually explicit.

*(continued on page 2)*

“But the possibility always exists,” warns Long. She cites the example of a Pennsylvania ice cream manufacturer that saw its workers’ comp “experience modification factor” skyrocket to three times its earlier level. The reason was that the employer didn’t perform prehire exams and inadvertently hired at least two people with prior soft-tissue back and shoulder injuries that became markedly worse, aggravated by the cold temperatures in which the employees worked.

As most HR people know, workers’ comp law is governed by individual states. And in most states, Long explains, if an on-the-job injury exacerbates a preexisting condition by even 1 percent, all medical expenses are seen as part of the covered injury. If a diabetic employee, for example, injures his or her leg at work, the diabetes will be aggravated by the injury. And all medical treatment for both diabetes and the injury will be compensable under workers’ comp. By contrast, Florida, Oregon, Massachusetts, and to a lesser degree, South Dakota have adopted a more definitive way of separating on-the-job injuries from preexisting conditions. Only a condition that a doctor determines is at least 51 percent related to an on-the-job injury will be covered under workers’ comp in those states.

**Employers can ask** whether applicants are capable of performing the essential functions of a job. But, says Long, “people will *lie* on their applications in order to get a job they really need.” For ways to get at the truth, see “Action Items.”

When Quon found out what had happened, he sued, charging the department with violating his rights under the Fourth Amendment (freedom from unreasonable searches) and Arch for violating the Stored Communications Act. A trial court ruled in his favor, and judges for the 9th Circuit Court of Appeals affirmed that ruling. The city of Ontario then appealed the case to the Supreme Court. Its deliberations will be closely watched.

**What’s at stake?** We asked Attorney Arianna Gleckel, who has followed the case closely, to share her speculations and advice for employers. She is with the Arlington, Virginia, firm of Bean, Kinney, & Korman. “First,” she said, “remember that this concerns a public employer, so some things are different than they would be for a private employer.” For example, private employees can’t sue under the U.S. Constitution. Nevertheless, she feels the Supreme Court’s ruling will be big news for both public and private employers.

A second major point has to do with any employee’s “expectation of privacy.” The fact that SWAT team members had never been told, even informally, that their messages might be reviewed played a significant role in appellate judges’ opinion; that lack of warning, they seemed to conclude, meant that Quon had a legitimate expectation of privacy. For good advice for employers from Gleckel, see “A Closer Look.”

## Action Items

### Can Your Applicant Do the Job?

Workers’ compensation expert Teresa Long reminds you that no medical questionnaires or medical testing can be given to an applicant until you have offered the person a job—pending the results of such a questionnaire and tests. Here are the rest of her savvy recommendations:

- ✓ First, identify all the jobs in your organization that require strength or physical agility. Then ask a vocational expert to come in and write accurate job descriptions for those positions that are based on thorough evaluations of the requirements.
- ✓ Long recommends having the expert review those descriptions only once a year. Although knowledge and technical jobs change frequently and require updated job descriptions, those involving manual labor change less often.
- ✓ When you are interviewing applicants for any of those jobs, provide an occupational physician with the job description for that position. Must you send candidates to a doctor? Long firmly believes you should. “Employers shouldn’t try to play doctor and shouldn’t render medical opinions,” she says. Additionally, people are more likely to tell a doctor the truth than they are to a prospective employer. Here’s an example: Let’s say a person states on a medical questionnaire that he or she has never had surgery. The doctor asks the person to take off his shirt and immediately sees a long scar on his back.
- ✓ Remember that the goal is not to eliminate candidates or to shut people out, but to make sure you hire someone who can safely perform the essential functions of the job without risking his or her health.
- ✓ If you feel these steps will be too expensive, imagine your workers’ comp premiums tripling after some big claims have been paid.
- ✓ In the states that allow workers’ comp histories to be provided to employers as part of background checks, ensure that information is shared with and retained by the organization’s safety department, not HR.
- ✓ But if you’re not going to use the workers’ comp information—if a job doesn’t require physical capabilities, for example—don’t ask for it in the first place. That is, you should have and document the reason you need the information.

## QUESTIONS From Our READERS

### ‘What Do I Do About This Tricky Situation?’

Some of the toughest questions our legal experts receive are those concerning a specific problem with a specific employee. Here are three examples, all of which may involve the protections of the Americans with Disabilities Act (ADA).

**Q:** *One of our nurses is out on Family and Medical Leave Act (FMLA) leave after a drug overdose at home. But we are a healthcare facility, and one of the primary duties of our nurses is to administer medication to patients. We are very concerned with allowing her to do this; we fear she might take residents' medication for her own use, for example. If we report her to the Board of Nursing, would that violate HIPAA? What can we do?*

**A:** Our expert responded that HIPAA laws primarily govern health plans and healthcare clearinghouses, rather than employers, who may legally ask employees about their health issues when necessary. Although ADA requires keeping employees' health information confidential, current illegal drug use is not protected by ADA.

So an employer may perform drug testing on employees suspected of such use, provided it also abides by any relevant state laws. Furthermore, a fitness-for-duty certification can be required for anyone returning from FMLA leave, especially if safety concerns are based on the employee's health condition. If the person is unable to resume her former duties, an accommodation under ADA may be necessary.

**Q:** *One of our truck drivers, who's worked here for 6 months, abandoned his truck one day, saying he felt sick. His manager had to retrieve the truck and finish his route. Around the same time, the driver made mistakes with customers and sometimes arrived hours later than expected. His doctor excused him from work for 2 weeks for fatigue. But now his mother has told us he has a serious psychiatric illness and has periods of anxiety that incapacitate him. We think he presents serious safety issues. Can we terminate him?*

**A:** The driver may qualify as someone with a disability. The Equal Employment Opportunity Commission (EEOC) recommends that employers offer such accommodations

*(continued on page 4)*

## A Closer Look



Regarding employers reviewing texts that employees have sent on company-provided mobile devices, Arianna Gleckel points out that the process is not as simple as investigating e-mail stored on the organization's server—which is often accessible for years after it was sent—or performing automated tracking of what Websites employees are visiting using company computers. Instead, the organization must contact the wireless carrier and persuade it to share the text messages, which it may be reluctant to do.

Gleckel notes that e-mails stored on an employee or former employee's personal computer are often subpoenaed in the e-discovery process for lawsuits. Remember that the carrier in this texting case received the request/demand from a police department and may have seen it as the equivalent of a subpoena. For most employers, that would not usually be the case.

But that leads to one of Gleckel's key recommendations: An employer that wants to access and review an employee's texts "should have reason to suspect a clear violation of company policy." Assuming that employees have other ways of communicating personal messages, such as personal cell phones or employer-provided land-line phones, Gleckel recommends that employers specify that pagers and other mobile devices be used only for

business purposes. Gleckel isn't keen on employer monitoring of all e-mail and Web use; she prefers installing software on company computers that blocks access to certain kinds of prohibited sites, such as pornography or online gambling. It's not only easier to manage but also doesn't raise the privacy concerns inherent in monitoring.

Furthermore, employers who intend to conduct electronic monitoring should warn employees that they intend to do so. Some states, like Connecticut, require such notification, but it's a good idea to inform them even if state law doesn't require it. Says Gleckel, "Stress that every outgoing e-mail or text message reflects on the company that provided the communications equipment used. That way, employees will be more conscious that even their personal messages may come under scrutiny, and they are more likely to be careful to use appropriate language."

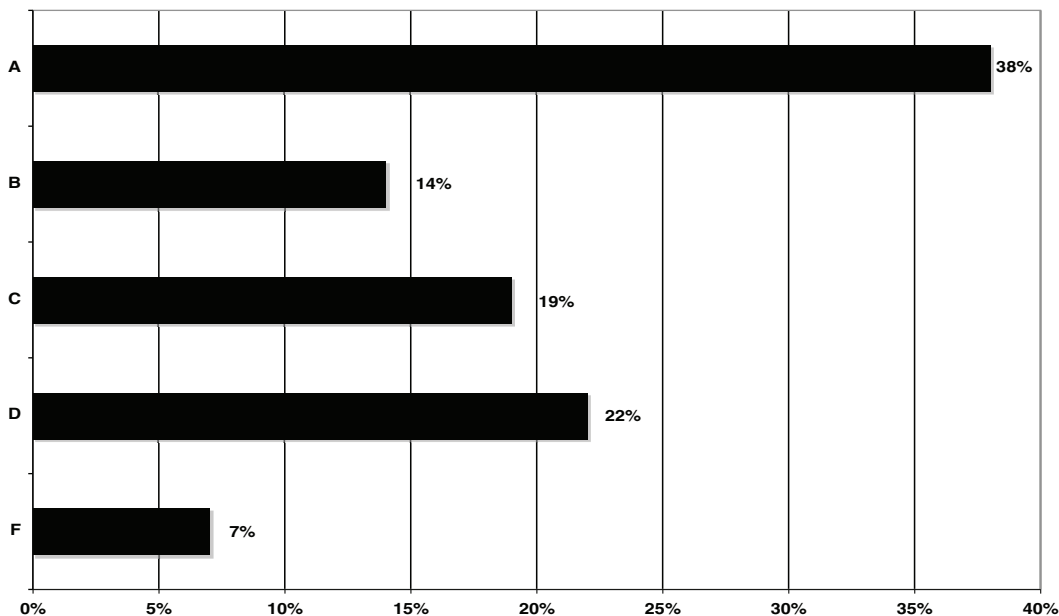
Appellate judges said in their opinion (*Quon v. Arch Wireless and City of Ontario*, No. 08-1332, 2008) that if the City of Ontario truly believed it had a legitimate need to review Quon's messages, it should have warned him of its intention ahead of time and/or given him the opportunity to redact all his personal messages. That way, officials would still have been able to tell whether his coverage was for legitimate business purposes.

"All employers should set expectations about what uses and purposes they intend mobile devices and other equipment to serve. Put that policy in writing, and be sure to update it each time you introduce a new technology," says Gleckel.

# SURVEY SAYS...

**Q.** How would you grade your organization's performance appraisal system?

**A.**



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## Questions From Our Readers (cont. from pg. 3)

for mental impairments as leave or flexible hours, but not monitoring of employee medication. And, ADA requires accommodation unless doing so would impose an undue hardship on the business. But EEOC notes that if an employer believes an individual poses a direct threat to the health and safety of himself or others, it must seek a reasonable medical judgment to that effect. In this complex situation, consulting an attorney experienced with ADA would be wise.

**Q:** *I have an employee, recently returned from psychiatric care, who has made comments to management and co-workers that we see as threatening. We've suspended him while we investigate, but what are our options?*

**A:** In its relevant guidance, EEOC notes that employers are not required to ignore misconduct by a disabled employee. ADA only requires that the required conduct be job-related and consistent with business necessity. Rules such as prohibitions on violence or threats of violence will always meet that test. But the employee may be qualified for FMLA leave rather than suspension.

## Your Complete Guide to ADA Compliance!

Finally, there is a practical guide that makes sense out of federal and state regulations having to do with the Americans with Disabilities Act (ADA). *The Complete Guide to ADA Compliance* will make it easy for you to:

- Determine when an employee is covered
- Coordinate leave issues
- Conduct interviews, hire, and terminate employees
- Interpret and clarify key ADA issues



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